

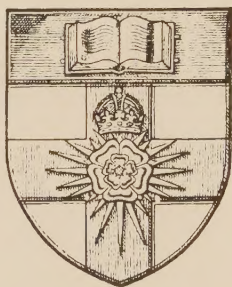
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CASES
 DETERMINED BY THE
 CHANCERY DIVISION
 AND IN
 LUNACY
 AND ON APPEAL THEREFROM IN THE
 COURT OF APPEAL.

THELLUSSON *v.* VISCOUNT VALENTIA.

[1905 T. 1086.]

C. A.

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April 17.

*Club — Rules — Power to Alter — Fundamental Objects — General Meeting —
 Resolution—Validity.*

The H. Club was formed in 1868 with express powers to alter any of its rules by the resolution of a prescribed majority. The rules were accordingly altered from time to time, and the subsisting rule 2 read thus: "The club is instituted for the purpose of providing a ground for pigeon-shooting, polo, and other sports surrounded with such accessories and so situated as to render it an agreeable country resort." Pigeon-shooting had been carried on at the club from its commencement down to 1905, prizes being given and competitions arranged by the committee. Polo and other sports had also been carried on for a shorter period. At a general meeting of the club held in May, 1905, a resolution was passed by the requisite majority that as from December 31, 1905, pigeon-shooting should be discontinued at the club. The minority brought an action against the trustees and committee for a declaration that the resolution was null and void, on the ground that it was not competent to the majority, under the guise of altering the rules of the club, to change its fundamental object:—

Held (affirming the decision of Joyce J., [1906] 1 Ch. 480), that no one of the objects in rule 2 was more a fundamental object of the club, in the sense that it could not be varied or excluded, than any other mentioned in that rule; that what had been done was within the power of altering the rules; and that consequently no such declaration as was asked for ought to be made.

APPEAL from Joyce J. (1)

The plaintiffs were members of a club called the Hurlingham Club. They brought this action on behalf of themselves and

(1) [1906] 1 Ch. 480.

C. A. other members of the club claiming (inter alia) a declaration that
1907 a resolution passed at the annual general meeting of the club
THELLUSSON on May 20, 1905, to the effect that pigeon-shooting should be
v. discontinued at the club, was not binding on the members of the
(VISCOUNT). club and was null and void.

The defendants were the trustees and one member of the committee of the club.

The club was formed in 1868, its objects being thus stated in the original rules:—"Rule 2. The club is instituted for the purpose of providing a ground for pigeon-shooting surrounded with certain accessories, and so situated as to render it an agreeable country resort, not alone to those who take part in pigeon-shooting, but also to their families and friends." The original rules also contained express powers to alter any of the rules. These powers had been exercised from time to time, and in particular rule 2 had been altered, and now ran as follows:—

"Rule 2. The club is instituted for the purpose of providing a ground for pigeon-shooting, polo, and other sports, surrounded with such accessories and so situated as to render it an agreeable country resort, not only to members, but also to their families and friends."

Rule 15 provided that there should be not less than three nor more than five trustees, to be chosen by the committee from the members of the club, in whose names, under the direction of the committee, all securities should be taken and investments made; the whole property of the club being, notwithstanding, subject to the disposition of the committee.

Rule 16 was as follows:—"All the concerns of the club and all arrangements for its management shall be conducted by a committee consisting of the trustees of the club and eighteen elected members. The committee shall have power to make and publish such by-laws (consistent with these rules) as they shall from time to time think necessary to the well-being of the club."

Rule 17 provided that six of the elected members of the committee should represent pigeon-shooting, six polo, and six the general purposes of the club.

Rule 22 provided that the annual general meeting should be held on or before the third Saturday in May for the purpose of

receiving the report of the committee and the accounts, "and for discussing any proposals which might require the decision of a general meeting, and of which due notice had been given." The rule then proceeded: "(b) Proposals for adding to or altering the rules of the club, except by the committee, shall be considered and voted upon only at the annual general meeting, and no such proposition shall ever be adopted without the sanction of a majority consisting of two-thirds of the votes given at a meeting of at least fifty members. (c) No subject which does not relate to the management of the concerns of the club shall be proposed or brought forward for discussion at any general meeting of its members."

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Rule 30 provided (*inter alia*) that general meetings should be held for certain purposes, and for receiving propositions for any new rule or alteration of any existing rule of the club; and rule 31 was as follows:—"If at any other time it shall appear expedient to adopt any new rule or alter any old one or to make any other proposition which may appear to require the sanction of a general meeting, the committee may call an extraordinary general meeting."

The property of the club, which was vested in the trustees, consisted of a house and extensive grounds situated at Fulham. Part of the grounds had always been set apart and used for the sport of pigeon-shooting, and prizes had been provided and matches arranged by the committee. It appeared that once a year an international pigeon-shooting contest was held at the club.

At the annual general meeting of the club, which was held on May 20, 1905, and at which upwards of 300 members were present and voted, the following resolution was duly passed by a majority consisting of upwards of two-thirds of the votes given thereat:—"Resolved, that pigeon-shooting be discontinued at the Hurlingham Club after December 31, 1905."

Upon the passing of that resolution the plaintiffs commenced this action.

Joyce J. held that there was no fundamental rule of the club that any particular sport should be provided; that what had been done was within the power of altering the rules; and consequently

C. A. that no such declaration as was asked for ought to be made. He
1907 therefore dismissed the action.

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The plaintiffs appealed.

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Danckwerts, K.C., and Sturges, for the appellants. The question in this appeal is whether the members of the club have power so to alter the rules of the club as to deprive certain of their number of rights which they have hitherto enjoyed. From its inception the club has been divided into shooting and non-shooting members. Practically, if this resolution be held binding, the shooting members will lose the benefit for which they have contracted. First, we submit that, when a club or a company or a partnership is formed for the purpose of carrying out a particular object, the power to make rules is necessarily subsidiary to that object unless the rules very clearly enable the nature of the club to be altered. Secondly, in order to alter the rules at all, it must be shewn that there is a power to do so; and, thirdly, the property of the club is held by the trustees upon trust for the members, and they cannot be deprived of their rights as cestuis que trust by a mere alteration of the rules. The power of a Court of Equity to interfere in the affairs of a club depends upon infringement of proprietary rights: *Rigby v. Connol* (1); *Baird v. Wells* (2); *Wise v. Perpetual Trustee Co.* (3)

Rule 2 defines the fundamental object of the club, and any power to alter the rules must be subordinate to that fundamental object. No ordinary power to make and alter rules for the government of the club ought to be construed so as to give power to alter the nature and character of the club, and to deprive some of the members of their right to use the club property in accordance with the fundamental object of the club. No doubt there is an implied power to make rules to regulate the exercise of the privileges of the members; but a power to regulate or manage does not confer the power to prohibit: *Toronto Municipal Corporation v. Virgo* (4); *Attorney-General for Ontario v. Attorney-General for the Dominion.* (5) *Dawkins v. Antrobus* (6)

(1) (1880) 14 Ch. D. 482.

(2) (1890) 44 Ch. D. 661.

(3) [1903] A. C. 139,

(4) [1896] A. C. 88.

(5) [1896] A. C. 348.

(6) (1881) 17 Ch. D. 615.

shews that the majority of the members of a club have no inherent power to expel the minority. The plaintiffs have an interest in the property of the club according to its rules. That property was provided for the express purpose (inter alia) of its being enjoyed by the shooting members, and, unless the rules warrant it, no minority can be deprived by the majority of its rights of enjoyment of the property of the club : *Harington v. Sendall* (1) ; *Graff v. Evans*. (2) No doubt a member's rights depend upon the rules, and if the rules extend to depriving him of some of those rights in certain circumstances he must submit to them : *Allen v. Gold Reefs of West Africa*. (3) A company or a partnership formed for a particular object cannot be turned into something wholly different simply by reason of general words in the memorandum of association or the articles of partnership : *Pickering v. Stephenson* (4) ; *Natusch v. Irving* (5) ; *Stephens v. Mysore Reefs (Kangundy) Mining Co.* (6) ; *In re German Date Coffee Co.* (7) *In re Haven Gold Mining Co.* (8) The rules are only intended to carry out the object for which the club is formed, and for nothing else. We submit that the order appealed from is wrong.

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Younger, K.C., and *Austen-Cartmell*, for the respondents. With regard to such a club as this no particular purpose or form of amusement, or any other object for which the club is formed, can be regarded as fundamental. The fundamental purpose of the club is the association of the members. Any such objects as the particular sports to be encouraged are purely secondary, and are subject to the regulation of the majority of the members for the time being. There has never been any limit to the power of the requisite majority to alter the rules, and rule 2 is just as much subject to alteration as any other. Assuming that the majority were not competent to alter the rules, then the remedy of the plaintiffs or any aggrieved member would be in damages. No case is to be found where a member has obtained an injunction against a club except to restrain an exclusion from

(1) [1903] 1 Ch. 921.

(2) (1882) 8 Q. B. D. 373.

(3) [1900] 1 Ch. 656.

(4) (1872) L. R. 14 Eq. 322.

(5) (1824) 2 Coop. C. C. 358.

(6) [1902] 1 Ch. 745.

(7) (1882) 20 Ch. D. 169.

(8) (1882) 20 Ch. D. 151.

C. A. the club premises. The Court has never compelled the majority
1907 of the members of a club to continue to use the club premises in
THELLUSSON any particular way ; and it will not make an order in this case
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VALENTIA specifically compelling the committee of the club to provide what
(VISCOUNT). they or the Court may consider to be a proper ground at Hurling-
ham for the purpose of enabling pigeon-shooting to be carried on.
The property of the club is not held on any trust to provide for
the carrying on of pigeon-shooting or any other particular
sport.

[They were stopped by the Court.]

COZÈNS-HARDY M.R. This case has been elaborately argued on behalf of the appellants, but now that we have had an opportunity of considering carefully the rules of this club, I have no doubt that the judgment of Joyce J. was perfectly right. We are dealing with a club which was founded all but forty years ago, viz., in 1868, originally for pigeon-shooting. The original rules contained a provision authorizing an alteration of the rules. At various dates from 1868 down to the year 1903 or 1904 alterations were made in the rules of the club, until in 1904 rule 2, which originally provided for pigeon-shooting, was altered, and at the date this action commenced it ran thus : "The club is instituted for the purpose of providing a ground for pigeon-shooting, polo, and other sports, surrounded with such accessories and so situated as to render it an agreeable country resort, not only to members, but also to their families and friends." The rules went on to say that the club shall consist of shooting and non-shooting members ; and then, when you come to rule 22 (b), there is what has been called an implied power to alter the rules, which, I think, more accurately should be called an express power of altering the rules, because rule 22 (b) runs thus : "Proposals for adding to or altering the rules of the club, except by the committee, shall be considered and voted upon only at the annual general meeting, and no such proposition shall ever be adopted without the sanction of a majority consisting of two-thirds of the votes given at a meeting composed of at least fifty members." That seems to me to be not a very skilfully drawn rule, I agree, but nevertheless a

rule expressly stating that a proposal for adding to or altering the rules of the club is within the competence of the members of the club, and that every member of the club, by joining this club, takes it subject to the contingency that the rules may be altered by this particular majority, at a particular meeting held according to those rules. But then we have been told that the Courts have been astute to say that a company or a partnership really formed for one particular object is not allowed to be turned into something wholly different, simply by reason of vague general words which you may find in the memorandum of association of the company or the articles of the partnership. I agree, but I fail to see the bearing of those authorities upon anything we have to consider here. It is conceded, and it could not be disputed, that, as matters now stand, although this club was originally formed for the encouragement of pigeon-shooting, it is now equally at least for the encouragement of polo and other sports besides pigeon-shooting, and I am quite unable to say that any one of these objects is more a fundamental object of the club, in the sense that it cannot be varied or excluded, than any other objects mentioned in rule 2. In short, I think it was competent of the club to do that which they have done, namely, to say that they desire not all and every of these particular sports to be encouraged, but such of them as a majority of two-thirds at a general meeting have said shall alone be encouraged. That, in substance, was the view taken by Joyce J., and it seems to me to be the correct view. Mr. Danckwerts pressed upon us sub-r. (c) of rule 22, and said it curtailed the effect of sub-r. (b) of that rule, in this sense, that it shewed that no rule could be added to, or altered, unless it related to the management of the concerns of the club as distinguished from the objects of the club itself. But I cannot think that is a sound argument. Sub-r. (c) of rule 22 appears to me to have been simply intended for this purpose—that at no meeting of the club should there be allowed discussion on general politics, or social politics, or anything but the affairs of the club. That being so, I see no ground for limiting the generality of sub-r. (b) by reference to sub-r. (c). In my opinion the judgment of the learned judge in

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C. A. the Court below was right, and this appeal should be dismissed
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SIR GORELL BARNES, PRESIDENT. I have nothing to add, except that I should like to say that the strongest point put forward by Mr. Danckwerts is with regard to the effect of sub-r. (c). It seems to me that it has not the effect that he contended for of controlling the operation of sub-r. (b) to the extent suggested by him. I agree with what the Master of the Rolls has said in his judgment on the other points.

KENNEDY L.J. I agree with the judgments which have been pronounced, and I have nothing to add.

Solicitors: *William Sturges & Co.; Nussey & Fellowes.*

G. A. S.

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April 16, 17,
26.

In re ROBBINS.

ROBBINS v. LEGGE.

[1906 R. 1002.]

Annuity—Will—Direction to purchase Annuity of specified Amount—Death of Annuitant before Probate—Right to Value of Annuity.

A testator by his will directed his trustees out of the proceeds of sale and conversion of his estate, after payment of his debts, and funeral and testamentary expenses, to purchase in the name of his wife a Government annuity of 400*l.* for her life. The wife survived the testator, but died sixteen days later, before the will was proved or any of the debts were paid:—

Held (affirming the decision of Swinfen Eady J., [1906] 2 Ch. 648), that the annuity, and the right to take its value in cash instead of the annual payment, vested in the widow on the testator's death, and that therefore her legal personal representatives were entitled to such a sum as would, at the date of the testator's death, have purchased the annuity.

Dawson v. Hearn, (1831) 1 Russ. & My. 606, observed upon.

APPEAL from Swinfen Eady J. (1)

Henry Robbins by his will dated February 7, 1900, after making certain specific devises and bequests, gave all his residuary estate to trustees upon trust for sale and conversion and to stand possessed of the proceeds "upon trust after payment thereof of

(1) [1906] 2 Ch. 648.

all expenses attending such sale and conversion and my debts funeral and testamentary expenses to purchase in the name of my wife Jemima Charlotte Robbins a Government annuity of the clear annual value of 400*l.* for the life of my said wife Jemima Charlotte Robbins," and upon further trust to pay certain pecuniary legacies and pay the residue to Colonel Robbins, his son by a former marriage.

The testator died on October 11, 1905, and his will was proved on November 25, 1905.

Jemima Charlotte Robbins died on October 27, 1905. She had made no election to take the value of the annuity in cash.

In June, 1906, administration was taken out to her estate by two of her next of kin.

The administrators having claimed to be entitled to the sum which would at the testator's death have purchased the annuity, a summons was taken out by the residuary legatee for the determination of the question whether the legal personal representatives of Jemima Charlotte Robbins were entitled to be paid any and what sum in respect of the annuity.

Swinfen Eady J. held that the legal personal representatives were entitled to such a sum as at the date of the death of the testator would have purchased a Government annuity of 400*l.* for the life of the widow.

The residuary legatee appealed.

Vaughan Hawkins (*Eve*, K.C., with him), for the appellant. The time for the payment of an annuity or for the purchase of an annuity is regulated by the duty of the executor to make payments within a year of the death. An annuity is really a series of annual legacies, the first payment being due at the end of the year. On the other hand, an annuity given in the shape of a direction to purchase is a legacy of the amount required to purchase it. The purchase of a Government annuity cannot be made after the death of the proposed annuitant. The gift, therefore, of the annuity fails altogether. *Dawson v. Hearn* (1) did not really decide what Swinfen Eady J. said it did. The ratio decidendi of that case was that the annuity was directed to be

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purchased within a given time, that the annuitant had survived that period, and the executors ought to have bought the annuity within the time specified. The gift is of an annuity on the particular life. That implies that the annuitant is to be alive at the particular time. The paramount intention is to provide for a person living at the time when the annuity would have to be purchased, i.e., twelve months from the death of the testator, or such earlier period as the executors might think fit. That being so, Swinfen Eady J. was clearly wrong in holding that what was vested in the widow was such a sum as at the date of the death of the testator would have purchased the annuity. [He also referred to *Yates v. Compton* (1); *Barnes v. Rowley* (2); *Bayley v. Bishop* (3); *Palmer v. Craufurd* (4); Roper on Legacies, 4th ed. p. 646, s. vii., 5.]

Micklem, K.C., and *A. Roscoe*, for the respondents. The authorities clearly support the judgment of Swinfen Eady J. Where no date is fixed the annuity runs from the testator's death. It may be common form to insert a direction to the executors to pay out of the general estate until the purchase of the annuity, but that only carries out what the law would do in the absence of any such direction. *Yates v. Compton* (1), coupled with *Dawson v. Hearn* (5), are sufficient to support the contention that the annuitant takes a vested interest at the testator's death, and that it makes no difference whether the annuity can be purchased at once, or whether the testator gives a specified sum to be laid out in the purchase of an annuity, or directs the purchase of an annuity of a specified amount. In *Dawson v. Hearn* (5) a period was fixed for the purchase of the annuity. Here there was no limit, and the annuity runs from the testator's death. Where the estate is insufficient to answer all the annuities and legacies the rule is to value the annuity as at the death: *Wroughton v. Colquhoun* (6); *Carr v. Ingleby* (7); *Long v. Hughes*. (8)

Vaughan Hawkins, in reply, referred to *In re Friend*. (9)

Cur. adv. vult.

(1) (1725) 2 P. Wms. 308.

(2) (1797) 3 Ves. 305.

(3) (1803) 9 Ves. 6.

(4) (1819) 3 Swans. 482.

(5) 1 Russ. & My. 606.

(6) (1847) 1 De G. & Sm. 357.

(7) (1831) 1 De G. & Sm. 362, n.

(8) (1831) 1 De G. & Sm. 364, n.

(9) (1898) 78 L. T. 222

April 26. COZENS-HARDY M.R. (in delivering the judgment of the Court, Cozens-Hardy M.R., Sir Gorell Barnes, President, and Kennedy L.J.).

This appeal from a decision of Swinfen Eady J. raises a curious question as to the construction and effect of a clause in the will of a testator who gave his residuary personal estate and residuary real estate upon trust for sale and conversion, and directed the trustees "to stand possessed of and interested in the monies to arise and be produced from such sale and conversion and of such parts of my said personal estate as may consist of money at the time of my death upon trust after payment thereof of all expenses attending such sale and conversion and my said debts funeral and testamentary expenses to purchase in the name of my said wife Jemima Charlotte Robbins a Government annuity of the clear annual value of 400*l.* for the life of my said wife Jemima Charlotte Robbins."

The testator died on October 11, 1905. His widow died on October 27, 1905, before the will was proved. She had not done anything with reference to the annuity, nor had the executors done anything prior to her death. Her representatives claim to be entitled to a sum of money in respect of this gift.

Now the effect of a direction to apply a definite sum of money in the purchase of a life annuity for the sole benefit of a particular individual has been often discussed, and now admits of no reasonable doubt. It is regarded as a legacy of the definite sum which will be satisfied by the purchase of an annuity, but unless and until the purchase is made it is regarded as a legacy of the definite sum vesting in the intended annuitant on the testator's death. It makes no difference that the annuity is not directed to be purchased until some future period if the annuitant survives the testator and dies before that period. The legal personal representative of the intended annuitant can claim the definite sum as a legacy. In the present case there is no definite sum directed to be applied in the purchase of an annuity, but the executors are directed out of the proceeds of the residuary estate to purchase a Government annuity of 400*l.* a year. No time is fixed within which the purchase is to be made. The widow died so shortly after the death that the purchase could not reasonably

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have been made, and obviously no purchase of a life annuity can be made after the death of the proposed annuitant. It is contended by counsel for the appellant, the residuary legatee, that under these circumstances the whole gift has failed and that the widow's legal personal representatives are not entitled to anything. In our view this contention cannot prevail. On principle it is difficult to see how any distinction can fairly be drawn between a gift of a definite sum to purchase an annuity and a gift of so much money as is requisite to purchase a definite annuity. "Id certum est quod certum reddi potest." And, indeed, it has been held by authority, which binds this Court, that no such distinction exists. In *Dawson v. Hearn* (1) Lord Brougham says: "I can see no difference between giving a sum of money to be invested (2) in an annuity, to be paid half-yearly to A. B., and ordering the executor to lay out so much money as shall be sufficient to buy for A. B. an annuity of a certain amount." It was urged by Mr. Vaughan Hawkins that that case turned upon the circumstance that the annuity was directed to be purchased within three months, and that the widow survived that period, but we cannot accept that view. Lord Brougham at the commencement of his judgment said that the absolute interest in the annuity vested at the decease of the testator in the widow. In other words, it was not a contingent interest, or a vested interest liable to be divested, but was an absolute interest, and as such it vested in the executors of the widow. We agree with the judgment of Swinfen Eady J. on this point, and do not think it necessary further to discuss the authorities referred to by him.

But there is one point upon which it is right to add a few words. The order under appeal declares that the widow's representatives are entitled to such a sum as at the date of the death of the testator would have purchased a Government annuity of 400*l*. It is contended that this must be wrong, because if a Government annuity had been purchased it would only run from the date of the purchase, and that, assuming the widow to have survived, the annuity would run from the end of twelve months, when legacies are payable, or from such earlier

(1) 1 Russ. & My. 606, 614.

(2) "Vested" in the report as printed.—F.P.

period as the executors might think fit to pay legacies. But there is a fallacy in this argument. It is well settled that a simple gift of an annuity is a gift of an annuity commencing from the testator's death, and we are unwilling to hold that a provision intended to secure the annuitant by purchasing a Government annuity has the effect of depriving the annuitant of the whole annuity during the first year. In the absence of authority to the contrary we are prepared to hold that the character of the annuity does not depend upon the form in which it is secured, and that in the absence of words defining the date of its commencement it ought in all cases to commence from the testator's death. The practice of the Court in valuing an annuity where there is a deficient estate is always to ascertain its value at the death of the testator. The purchase of a Government annuity may not be possible on the prescribed day, where a particular time is prescribed, such as within three months, either by reason of the impossibility of realizing sufficient assets before the day arrives or by reason of the Bank offices being closed. In such a case we think there is an implied gift of the annuity out of the testator's estate from the prescribed day until the purchase is made. And when no time is prescribed there is an implied gift of the annuity from the testator's death until the purchase is made. It was urged that in *Dawson v. Hearn* (1) the widow's representatives were only given the sum which would have been required at the expiration of three months from the death to purchase the annuity. We have examined the decree in the Record Office, from which it appears that the bill only claimed this. The point was not argued, and it would be wrong to treat the decree in that case as decisive.

We think the learned judge was right in saying that the legacy which vested in the widow was a legacy of the amount required to purchase an annuity as from the date of the testator's death, and not from any subsequent or ascertained period.

It follows that in our opinion this appeal must be dismissed.

Solicitors: *Peacock & Goddard, for H. & C. Collins, Reading; Field, Roscoe & Co., for Chalinder & Herington, Hastings.*

(1) 1 Russ. & My. 606.

C. A. *In re J. L. S. DE LARRAGOITI (A PERSON OF UNSOUND MIND).*

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Lunacy—Lunatic out of the Jurisdiction—Foreign Curator—English Stocks and Shares—Transfer—Discretion of Judge in Lunacy—Special Circumstances—Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 134.

Order made under s. 134 of the Lunacy Act, 1890, upon the application of the curator of a lunatic resident in France, and under the special circumstances of the case, for the transfer of stocks and shares in England to which the lunatic was entitled, although the same were not required for his maintenance.

In re Elias, (1851) 3 Mac. & G. 234, followed.

THIS was an application by the curator of one J. L. S. de Larragoiti, at present residing in France, who had been declared lunatic by the French Court, for an order that certain stock, securities, and shares in England standing in the name of the lunatic might be transferred to the curator under s. 134 of the Lunacy Act, 1890.

The lunatic, a man of great wealth, was born in Spain, but went to America, where he became a citizen of the State of New York; subsequently he had resided in Barcelona, Constantinople, Brazil, and several towns in America, but for the fifteen years preceding the present application he had resided in Paris, where he had fixed his principal establishment, and was director-general of a French life assurance company. His family consisted of two sons and five daughters, all of whom, with the exception of one daughter, were of age; four of the daughters were married, one of them to a French subject.

By a judgment of the Civil Court of First Instance of the Department of the Seine, pronounced on April 6, 1906, the said J. L. S. de Larragoiti, described as formerly of No. 4, Avenue d'Iéna, Paris, but then residing in a private asylum at Suresnes, was declared lunatic and interdicted from the administration of his person and property, the Court considering that it had jurisdiction in consequence of the residence of the lunatic in France, and from the fact that the bulk of his property was in that country.

On April 25, 1906, at a meeting of the family council of the said J. L. S. de Larragoiti, attended by the two sons and four sons-in-law, and held in conformity with the law and custom of France, one William Edward Ingersoll, a resident in Paris, was appointed *tuteur* or curator of the person and estate of the said J. L. S. de Larragoiti.

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On October 3, 1906, at a meeting of the said family council, the said William Edward Ingersoll was by resolution authorized as such *tuteur* or curator as aforesaid to collect, obtain possession of, and deal with all moneys and securities in England belonging to the said estate.

On October 26, 1906, an order of the Civil Court of First Instance of the Department of the Seine was made homologating this resolution of the family council.

There was evidence by two members of the French Bar that the result of these orders was that the said J. L. S. de Larragoiti had been duly and lawfully according to the law of France declared of unsound mind, and that William Edward Ingersoll had been duly and regularly appointed *tuteur* or curator and was entitled by the law of France to collect and obtain possession of, realize and deal with, all stocks, bonds and securities belonging to the estate of the lunatic in England, and to receive transfers and delivery thereof and to give proper receipts for the same, and generally to do everything that might be necessary to obtain possession of such securities and to realize the same.

The personal estate of the lunatic in England consisted of securities to bearer, which were in the custody of the London and County Banking Company, Colonial inscribed stock, shares in a great many limited companies, and a large number of mining shares of a speculative character, all standing or registered in the name of the lunatic. The total face value of the personal estate in England was stated to be about 37,000*l.* It was also stated that the lunatic was possessed of other personal estate in France and elsewhere worth over two millions.

In March, 1907, the curator took out a summons under s. 134 of the Lunacy Act, 1890, asking for an order for transfer of these stocks, securities, and shares into his name, and for delivery over of the various bearer securities.

C. A. Upon the application coming before one of the Lords Justices
 1907 the form of order proposed to be made was sent back to the
 DE Lunacy Department with a note, "No evidence that the property
 LARRAGOITI is needed for the maintenance of the lunatic (*In re Knight*, [1898]
 (A PERSON 1 Ch. 257). No evidence from bank that he has been in receipt
 OF UNSOUND of the dividends or other confirmatory evidence that he is the
 MIND), owner of the shares."
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Further evidence having been supplied on the second point, the matter came again before another of the Lords Justices, and he required to be satisfied that the English Court would recognize the order of a foreign Court made with reference to a person who was not necessarily a subject of that foreign country, and ordered the application to be adjourned into Court for argument on this point and the first point raised by the other Lord Justice.

Astbury, K.C., and *W. E. Vernon*, for the applicant. It is clear from *In re Knight* (1) that the Court has an absolute discretion whether it will or will not make the order.

[COZENS-HARDY M.R. In that case the Court required evidence that the property was required for the maintenance or other purposes of the lunatic.]

In the present case these securities are not required for the lunatic's maintenance. The real object of this application is to vest these securities in some one who can look after them and realise them when the market is favourable. Apart from the question of expense, if an application for leave to sell had to be made every time a sale of any of these mining shares was considered desirable, the market might be lost before leave could be obtained; it is therefore for the benefit of the lunatic's estate that these investments should be vested in some one who can deal with them promptly as he may be advised. If an action were brought in this country by the curator on behalf of the lunatic against the various companies and the bank there would be no defence: *Didisheim v. London and Westminster Bank*. (2) It is to save the enormous expense of having to bring perhaps forty different actions that this application is made.

(1) [1898] 1 Ch. 257.

(2) [1900] 2 Ch. 15.

[COZENS-HARDY M.R. In *New York Security and Trust Co. v. Keyser* (1), where *Didisheim v. London and Westminster Bank* (2) was considered, the income of the fund only was ordered to be paid to the foreign committee.]

The object of this application is to get control of the securities; the income is not of much consequence to this lunatic.

[KENNEDY L.J. In *In re Brown* (3) the Court was satisfied that all the stocks in question were required for the maintenance and support of the lunatic.]

If the Court is going to lay down a rule that it will not make any transfer except for the maintenance and support of the lunatic, then, if the lunatic has enough to live upon from other sources, no transfer can ever be made, and in a case like the present many of these shares may be absolutely lost; there is no such rule, for the Court has an absolute discretion in each case, which is not limited by *In re Brown* (3) and *In re Knight*. (4)

[COZENS-HARDY M.R. The jurisdiction conferred by the Lunacy Act, 1890, is not confined to English persons, so long as the property or the person is within the jurisdiction.]

Sect. 116 does not help this case; the words "lawfully detained" in sub-s. 1 (c), mean "detained" under the Acts of Parliament of this country: *In re Whalley* (5), explaining *In re Watkins*. (6)

[COZENS-HARDY M.R. I think I have made orders appointing a receiver of the property of a foreign lunatic.]

The Civil Court of First Instance of the Department of the Seine appears to have satisfied itself that it had jurisdiction over this lunatic, as a resident in Paris, with property in Paris, to make the order of April 6, 1906, and when you find that a competent foreign Court has made an order declaring a resident within its jurisdiction to be insane, this Court will recognize the order of the foreign Court and the curator appointed by it. In *In re Elias* (7) the circumstances were much the same as the

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(1) [1901] 1 Ch. 666.

(4) [1898] 1 Ch. 257.

(2) [1900] 2 Ch. 15.

(5) [1906] 1 Ch. 565.

(3) [1895] 2 Ch. 666.

(6) [1896] 2 Ch. 336.

(7) 3 Mac. & G. 234.

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present, and an order to transfer the corpus of the lunatic's property to the foreign curator was made.

There is no reason for keeping these securities in England, and a good reason has been shewn why they should be transferred to the curator appointed by the French Court. The evidence is clear that the curator is entitled according to French law to have these stocks transferred, and that he can give a receipt for them.

Power to transfer the property of a lunatic resident abroad was conferred by the Lunacy Regulation Act, 1853, and the earlier Acts in much the same terms.

[The following authorities were also cited as instances where similar applications had been made, and in some instances refused: *Newton v. Manning* (1); *In re Garnier* (2); *In re Morgan* (3); *In re Mitchell* (4); *In re Barlow's Will* (5); *In re De Linden*. (6)]

COZENS-HARDY M.R. I am much obliged to counsel for the trouble they have taken in informing us, so far as they are aware, of all the authorities.

This is an application under s. 134 of the Lunacy Act for an order vesting in the French *tuteur* of a lunatic resident in France very considerable sums of stock of various kinds in England.

The circumstances of the case are peculiar, and I am bound to mention them, because it is settled by authority, which is binding upon us, that s. 134 undoubtedly is not a section which binds the Court to make an order of the kind asked for here. I should be very sorry for one moment to lend any countenance to the suggestion that we are bound at the request of a committee, curator or *tuteur*, or whatever he is called, to make an order transferring to a foreign country stocks, funds, and securities which are here; but, as in all other cases where the Court has a discretion, it is difficult, and, speaking for myself, I think it is dangerous, to lay down with any attempt at accuracy the conditions under which that discretion ought to be exercised.

(1) (1849) 1 Mac. & G. 362.

(2) (1872) L. R. 13 Eq. 532.

(3) (1849) 1 H. & T. 212.

(4) (1881) 17 Ch. D. 515.

(5) (1887) 36 Ch. D. 287.

(6) [1897] 1 Ch. 453.

To do so would be really taking away the discretion which our successors ought to possess in matters of this kind.

The Courts have repeatedly said that if it is shewn that the capital is required for the maintenance and benefit of the lunatic, using maintenance, not in the narrow sense of affording bread and cheese, but in the wide sense in which the Court uses it in lunacy matters, then they would undoubtedly transfer the fund; but they have also said repeatedly that if that is not the case, and if there is no special reason shewn why the corpus should be parted with, they will only pay the income to the foreign committee and leave the corpus of the fund where it is.

The present case is very peculiar. The lunatic is a man of very great wealth—he is said to be a millionaire: his domicile of origin was American; whether his domicile is now in France is, to say the least, very doubtful, but he is resident in Paris. He has been found a lunatic according to the law of France, and according to the law of France a family council has been formed, which has resolved that the committee or *tuteur* should take steps to get what I may call the English securities transferred to France, and that resolution of the family council has been approved and sanctioned by the French Court; and under those circumstances the French committee or *tuteur* makes this application. Without saying in any way that this ought to be treated as an absolute rule, that wherever there is a family council and there is an order of a foreign Court this Court is bound to follow the suggestion or request of that Court, I see no reason in the present case why we should not do that which apparently is desired by all the members of the family who are entitled to be heard and which is approved by the French Court, and as to which there seems really no objection.

On the whole, therefore, I think we may exercise the jurisdiction which we undoubtedly possess under s. 134 and make the order which is asked for.

KENNEDY L.J. I agree, and have nothing to add.

Solicitor: *Edward B. Gee.*

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May 14.*In re* GRANGE.CHADWICK *v.* GRANGE.

[1906 G. 1484.]

Mortgage—Sale by Mortgagee—Surplus Proceeds of Sale—Trust for Mortgagor, “his Heirs or Assigns”—Conversion—Realty or Personalty—Lunacy of Mortgagor.

The trust of the surplus proceeds of sale provided that they should be paid to the mortgagor, “his heirs or assigns.” The mortgaged property was sold in 1900 under the power of sale contained in the mortgage, and there was a considerable surplus. The mortgagor became a lunatic after the mortgage, but before the sale, and continued in that condition until his death intestate in 1906:—

Held, that the surplus proceeds of sale must be treated as personalty notwithstanding the language of the trust.

Decision of Parker J., [1907] 1 Ch. 313, affirmed.

APPEAL from Parker J. (1)

The question for decision raised by this appeal was whether under the terms of the mortgage deed the surplus proceeds of sale belonged to the next of kin or heir-at-law of a lunatic mortgagor. The mortgage deed and the facts are given in greater detail in the report of the case in the Court below, but the following summary of them is all that is necessary to make this report intelligible.

A mortgage of freeholds of August 25, 1871, contained the usual power of sale in default of payment, the trust of the surplus proceeds of sale providing that they should be paid to the mortgagor, “his heirs or assigns.”

Since the year 1883 the mortgagor had been a lunatic, not so found, and had been confined as a pauper lunatic in an asylum, where he remained until his death intestate in January, 1906.

In June, 1900, the property comprised in the mortgage was sold by the mortgagee under the power of sale, and there was a considerable surplus. A dispute having arisen on the death of the lunatic whether the surplus proceeds of sale ought to be treated as realty or personalty,

(1) [1907] 1 Ch. 313.

Parker J. held, notwithstanding the words of the trust, that the proceeds of sale must be treated as personalty.

The heir-at-law appealed.

A. H. Poyser and Koppel, for the appellant. At the time of the sale the mortgagor was not in a position to make any election, and consequently there never was any conversion from realty into personalty.

[COZENS-HARDY M.R. The sale took place in the mortgagor's lifetime, and at his death this surplus was in fact money.]

That may be so, but it was notionally land. It is not usual to change the character of a lunatic's property : *Attorney-General v. Marquis of Ailesbury*. (1) The mortgage deed, by providing that the surplus proceeds shall be paid to the "heirs or assigns" of the mortgagor, contains an indication of intention that there should be no conversion : *In re Underwood*. (2) The mortgagor in effect declared that in the event of a sale under this power of sale the surplus proceeds should be treated as realty ; the subsequent lunacy of the mortgagor prevented him from exercising any intention to convert, or from electing to take this money as personalty, and on his death intestate it belongs to his heir-at-law. The proceeds of sale under the Partition Act, 1868, are treated as realty : *Foster v. Foster*. (3)

[COZENS-HARDY M.R. That is by virtue of s. 8 of the Partition Act, 1868.]

It is only equitable that the property should be kept in the same condition as it was in when the mortgage was created in 1871, while the mortgagor was of sound mind, by giving effect to the wording of the trust.

W. S. Sherrington, for the next-of-kin, and *W. H. Cozens-Hardy*, for the administratrix of the mortgagor, were not called upon.

COZENS-HARDY M.R. Mr. Poyser has said all that can be said on behalf of his client, but this seems to me to be an extremely plain case. The mortgage was executed by the lunatic while he was of sound mind ; he gave the mortgagee an absolute power of sale in certain events, and that power of sale was exercised by

(1) (1887) 12 App. Cas. 672.

(2) (1857) 3 K. & J. 745.

(3) (1875) 1 Ch. D. 588.

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the mortgagee in the lifetime of the lunatic. The mortgagee helped himself to his principal and interest, and there is a balance in hand. The form of the trust for sale was that it was to be paid to the mortgagor, "his heirs or assigns," but the effect of the sale was really to create a debt from the mortgagee to the mortgagor of the surplus proceeds, and it seems to me to be quite hopeless to contend that a conversion of this sort can have any other effect than to change the surplus for all purposes into money. There are no trusts for reconversion into real estate, and there is no equity between heir-at-law and next of kin, and there is no ground for holding that this is anything else than what it professes to be and is in fact, namely, cash which must go to the next of kin and the administrator, and not to the heir-at-law.

I think the judgment of Parker J. is quite right, and I do not desire to add anything to it.

SIR GORELL BARNES, PRESIDENT. I am of the same opinion.

BUCKLEY L.J. I agree. The mortgagor in 1871 so dealt with his real estate as that, in an event which subsequently happened, the mortgagee was entitled to turn it into personal estate. That event happened. In the interval the mortgagor had become lunatic. That is immaterial; no consent on his part was wanted. The mortgagee had the right to do what he did. The form of the mortgage deed was that if the power of sale were exercised any proceeds should be paid to the mortgagor, "his heirs or assigns." Supposing that does amount to a declaration made by him by deed that personal estate of his shall be real estate, that can have no effect at all. The sale was effected under a disposition made by him; the estate was properly converted into money, and at the time when he died it was money, and it devolves as money. But for the argument which we have heard from Mr. Poyser I confess I should have thought the case was unarguable.

Solicitors: *W. Stubbs, for Hirst & Capes, Harrogate; Helder, Roberts, Walton & Giles, for E. H. Coates, Wetherby; Halse, Trustram & Co., for Arnold Muir Wilson, Sheffield.*

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[1904 A. 231.]

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*London—Buildings not of uniform Height—Gabled Building—“Height”—
 “External Wall”—New Street—Width of Street—Restrictions—Part—
 Alleged to Offend—Method of Measurement—London Building Act, 1894
 (57 & 58 Vict. c. cccviii.), s. 5, sub-ss. 15, 21; s. 49—Attorney-General—
 Laches—Delay.*

Jan. 21, 22,
 23, 24.

In determining whether a building which is not of uniform height contravenes the provisions regulating the height of buildings contained in s. 49 of the London Building Act, 1894, the building must not be regarded as a whole, but each part alleged to offend against the Act must be treated and examined as if it were a separate building, and, for the purpose of ascertaining the height permitted by the section, the distance from the opposite side of the street of the front or external wall of the particular part under examination (whether the same is or is not the front wall of the building considered as a whole) must be measured from the point at which a line dropped vertically down that front or external wall would reach the ground level.

There is nothing in s. 49 to prohibit the erection of a building in a series of steps or terraces, one behind the other, so long as the provisions of the Act are duly observed.

A narrow cul de sac in existence before August 7, 1862, but which had been subsequently opened up into a thoroughfare and widened out:—

Held to be a new street for the purposes of s. 49.

WITNESS ACTION.

The plaintiffs the Attorney-General, at the relation of Henry Gibbon, since deceased, and the latter's legal personal representatives, E. R. Gibbon and C. M. Moore, the owners of the equity of redemption of certain lands on the east side of Salem Road, Paddington, sought an injunction to restrain the defendants Metcalf & Greig and the defendant Bond from erecting any building on the west side of Salem Road so that the height of the external walls thereof would exceed the distance of the nearest external wall of the said building from the opposite side of Salem Road, contrary to the provisions of the London Building Act, 1894; and also a mandatory order requiring the same defendants to take down and remove so much of the block of flats (being the building above referred to) as had been erected contrary to the provisions of the said Act.

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The site of the block of flats in question was a corner plot fronting partly on to Moscow Road, which was an old street fifty-two feet wide, and partly on to Salem Road, which was forty feet wide. The height of the block facing Moscow Road and for a return of forty feet along Salem Road did not exceed the height allowed by the Act. Further on along Salem Road, however, part of the block was recessed back about twenty feet, and the front external wall of this part was about sixty feet high. Then the building projected or came forward again until it abutted on to the pavement in Salem Road, the wall at this part being forty feet high up to the base of a rounded top or gable which contained two storeys and was another twenty feet high. At the back of this projecting part the building rose several storeys higher still. The plaintiffs alleged that this projecting part and the buildings at the back of it contravened the provisions of the Act. (1)

(1) The London Building Act, 1894 (57 & 58 Vict. c. cxxiii.), provides:—
Sect. 5: “In this Act unless the context otherwise requires— . . .

“(15.) The expression ‘external wall’ means an outer wall or vertical enclosure of any building not being a party wall.

“(21.) The expression ‘height’ in relation to any building means the measurement taken from the level of the footway (if any) immediately in front of the centre of the face of the building or (where there is no such footway) from the level of the ground before excavation to the level of the top of the parapet or where there is no parapet to the level of the top of the external wall or (in the case of gabled buildings) to the base of the gable.”

Sect. 49: “After the commencement of this Act no existing building (other than a church or chapel) on the side of a street formed or laid out

after the seventh day of August one thousand eight hundred and sixty-two and of a less width than fifty feet shall without the consent of the council be raised and no new building shall without the consent of the council be erected on the side of any such street so that the height of such building shall exceed the distance of the front or nearest external wall of such building from the opposite side of such street.

“Where such building is erected or intended to be erected on a corner plot so as to abut upon more than one street the height of the building shall (unless the council otherwise consent) be regulated by the wider of such streets so far as it abuts or will abut upon such wider street and also so far as it abuts or will abut upon the narrower of such streets to a distance of forty feet from the wider street. . . .”

Sect. 62: “(1.) Not more than two storeys shall be constructed in the roof of any domestic building.”

The fee simple in the property was vested in the defendants KEKEWICH the Law Debenture Corporation, Limited, as trustees for debenture-holders of William Whiteley, Limited.

The defendants Metcalf & Greig had erected the block of flats under a building agreement dated March 30, 1903, under which William Whiteley, Limited, agreed to grant to them upon completion of certain buildings thereon a lease of the land in question for ninety years from March 25, 1902.

By deed dated March 31, 1903, the defendants Metcalf & Greig assigned by way of mortgage the premises comprised in the building agreement to William Whiteley as trustee for William Whiteley, Limited, and on October 30, 1903, created a second mortgage of the building agreement, and the lands, rights, and easements comprised therein in favour of the defendant Bond.

The external walls of the block of flats were practically completed before the issue of the writ in this action on February 11, 1904.

The block had been erected with the consent of the Paddington Borough Council and without any objection from the London County Council or the district surveyor, but the consent of the London County Council to the erection of the building had never been obtained.

On December 16, 1904, the defendant Bond entered into possession of the block of flats, which, at that time, had been completely erected and, except as to a small part thereof, roofed in.

The plaintiffs alleged that by the erection of the buildings to the height above mentioned Salem Road had been made dark and less healthy than it would otherwise be, and the access of light and air to the lands on the east side of the road and to the buildings thereon opposite to the defendants' building had been obstructed, and the value of such land and buildings had been seriously depreciated.

The defendants denied the allegations of the plaintiffs, and alleged that the provisions of s. 49 of the London Building Act, 1894, were not applicable to buildings in Salem Road, inasmuch as it was in fact an old road and was in existence long before 1862.

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As the result of the expert evidence the plaintiffs admitted during the course of the trial that the rounded top or gable of the projecting part of the building in Salem Road was a gable within the meaning of the Act.

The evidence relating to the existence of Salem Road before August 7, 1862, and the subsequent alteration of the road, sufficiently appears from his Lordship's judgment.

P. O. Lawrence, K.C., Danckwerts, K.C., and R. Cunningham Glen, for the plaintiffs. The plaintiffs make no complaint about the height of the building fronting on to Moscow Road or for the first forty feet down Salem Road. But, where there is a corner building like this, the part beyond forty feet back from the wider road must be taken and treated as a separate building, and it is in this part, which is further down Salem Road, that the defendants have sought to evade the provisions of the London Building Act, 1894, by putting on sham fronts. The centre of this part must be taken to be the height of the rest of the building; and, applying s. 49 of the Act, the height of the building must not exceed the distance of its front or nearest external wall from the opposite side of the street, and that in this case, and independently of any gable, would be forty feet. The height of the building taken as a whole must be governed once for all by the width of the street. The plaintiffs submit that in whichever way this front wall is regarded, whether as a building with a parapet or with a gable, it offends against the Act. In the former case the building must be cut down to a height of forty feet; but if it is a building with a gable, then, although under s. 62, sub-s. 1, there may be not more than two storeys above the base line of the gable, this building nevertheless offends, inasmuch as there are four or five storeys behind the gable.

Horace Ivory, K.C., and Tomlin, for the defendants William Whiteley and William Whiteley, Limited. We submit, first, that on the evidence Salem Road is not a new street formed or laid out after August 7, 1862, within the meaning of s. 49. There was a street there before that date, and it has been merely widened. To come within the Act, a street must be a new street just opened up. Secondly, the plaintiffs contend that the height of this building

must be measured from the centre of the face of the building in Moscow Road. Either the whole block is one building, or for the purposes of the Act it is to be taken as several buildings. If it is all one, then the front in Moscow Road is the proper place for measurement and the building does not offend. But if it is to be treated as several buildings, then the defendants are entitled in Salem Road to take the recessed part as one building and the projecting part as another building, treating them, in fact, as so many separate buildings; and in that case they submit, thirdly, that under s. 49, in measuring the height of any part of the building, regard must be had to the distance of the front or nearest external wall of that part of the building which is being measured from the opposite side of the street. Measured in that way, none of these parts taken by itself as a separate building offends against the Act. The projecting part is only forty feet up to the base of the gable and complies with s. 49, and the gable only contains two storeys as permitted by s. 62, sub-s. 1. Fourthly, the defendants submit that, even if all these contentions fail, this is not a case in which the Court will exercise its discretion and order the building to be pulled down, for there has been such unreasonable delay or laches on the part of the plaintiffs that such an order ought not to be made.

Stewart-Smith, K.C., and *W. E. Vernon*, for the defendant *J. C. Bond*. There is no definition in the Act of a "building," and it has been held to have two different meanings in the Act itself. In *Moir v. Williams* (1) it was held that a number of separate sets of chambers were not buildings within the Second Schedule to the Metropolitan Building Act, 1855. The building here is not one building; it is divided into three sections for the purposes of measurement under s. 49 of the London Building Act, 1894. There is the main part of the building, as to which no complaint is made. As to that, the "nearest external wall" must mean the nearest wall to the opposite side of the street, measuring straight across the street. The second part is the recessed part of the building, which must be treated in the same way. And then the third section of the building is the projecting or gabled part. The base of the gable being forty feet from the street, it comes

(1) [1892] 1 Q. B. 264.

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within the height specified by the Act for a gabled building. The point from which the height of any wall is to be measured is the same point from which the distance to the other side of the street is to be measured. That applies to the external wall behind the gable, and the height of that back part does not infringe the Act.

The Court will not grant a mandatory injunction against Bond, as the building was practically completed when he took his mortgage, and he took it without notice of any infringement of the Act, if infringement there be, and without knowledge of any complaint: *Gaskin v. Balls*. (1) Where a man enters upon a building which has been put up in breach of a covenant the Court will not order him to pull it down unless he has been personally guilty of the breach. Bond has done nothing but complete the building internally.

Then, lastly, there has been laches in applying to the Court. The cases decide that delay is a circumstance to be considered in determining whether the Court will interfere, even when the application is by the Attorney-General: *Attorney-General v. Sheffield Gas Consumers Co.* (2) The public authority here sanctioned the plans, and does not move in the matter, and then, eighteen months after the building was commenced and after it was practically completed, the Attorney-General moves. He is as much bound by laches as any other person: *Attorney-General v. Wimbledon House Estate Co.* (3) In that case Farwell J. said that the Court had a discretion in the case of Attorney-General actions as well as other actions.

Edward Ford, for the defendants Metcalf & Greig.

Martelli, for the defendants the Law Debenture Corporation.

P. O. Lawrence, K.C., in reply, was not called upon on the question of laches.

Upon the question of the construction of the Act, a "building" is an enclosure by external walls, and not subdivided by party walls, and no difficulty is created by the irregularity of external walls. The whole building must be looked at for the purpose of s. 49. According to the defendants' contention, the back part

(1) (1879) 13 Ch. D. 324.

(2) (1853) 3 D. M. & G. 304, 323.

(3) [1904] 2 Ch. 34, 42.

might be made higher and higher by a series of steps. The only question is whether the back part forms part of the building. If it does, it infringes the rule and must be taken down. The line of forty feet governs that part of the building: *London County Council v. Lawrance & Sons*. (1)

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KEKEWICH J. The subject-matter of this action is a building erected on a corner plot, abutting as regards one side on Moscow Road, and as regards the other side on Salem Road.

The first question is whether Salem Road is a street formed, or laid out, after August 7, 1862, the date mentioned in s. 49 of the London Building Act, 1894, as fixing a limit with reference to which the restrictions mentioned in that Act are to be applied or not. Salem Road certainly existed long before the date mentioned, but in the year 1898, under an order of the London County Council dated January 27, 1898, Salem Road was altered, and the Salem Road as it now exists is not identically the same as the Salem Road before 1862. But is it substantially the same? The old Salem Road was a narrow road, and it was a cul de sac. The direction of this narrow road, which is said to have been twenty-two or twenty-three feet wide, and according to the plan cannot have exceeded that, was entirely different from that of the present Salem Road, which is forty feet wide, so that a comparatively small portion of the soil of the old Salem Road constitutes the soil of the present Salem Road. Moreover, the present Salem Road is not a cul de sac, and in order to turn the old road into the new road buildings have been pulled down, not only on the side of the road, but at the head of it, so as to turn what was a cul de sac into a thoroughfare in the sense of a road leading from one road to another. It is not necessary to pursue the matter further. I hold that the Salem Road as now existing is not substantially the same as the old Salem Road, and therefore the Act applies to it as being a new street, that is to say, a street formed and laid out after the date mentioned in the Act.

I have, therefore, a building by the side of Salem Road to which the restrictions of the Act apply, and the real question in the

(1) [1893] 2 Q. B. 228,

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case is whether those restrictions apply to the present building so as to make it offend against the lines there laid down. Sect. 49 of the Act says that no new building by the side of a street shall be erected beyond a certain height. Does that mean that for the purpose of finding out whether the height has been exceeded or not the entire buildings are to be regarded? Of course, a building may be of uniform height, and of uniform shape as regards the part of it which comes into the calculation of height. There might be a horizontal parapet stretching along the whole way and defining the height from end to end, and it would be extremely easy to find in any street in London numerous buildings of that kind. But, obviously, a building need not be uniform in its character; and, again, it would be very easy to find many, though perhaps not so many, buildings which are not uniform. It seems to me impossible to conclude that the Legislature intended that in each case, whether there be uniformity or not, the whole building is to be regarded. I cannot conceive that the meaning of the Act is that one has to inquire in every case whether the whole building is within the limited height or not. That would lead to the absurd proposition that the whole building exceeded the height because in one part, where there was not uniformity, the height was exceeded. It seems to me that the true meaning of s. 49 is that one has to look at the whole building and pick out any parts which offend against the rules laid down. In other words, when the section says that no building is to exceed a certain height, it means that no building shall in any part exceed a certain height. It may be put, of course, in another way—that “no part of such building shall exceed”; but I think that “no new building shall exceed in any part” is the better expression. If that is the true meaning, and I think it is, it does not really introduce any words into the Act; it is only interpreting the word “building” as it must be interpreted. The duty of those who have to decide whether the restrictions have been observed or not is to pick out, as I have already said, the front parts which are alleged to exceed the restricted height and to ascertain whether they do in fact exceed it or not. If that is the right interpretation, it seems to me to follow that in examining each part the rules laid down in the Act must be

applied, and that it would be wrong in examining any one part to apply rules which are really laid down for, or directly applicable to, another part. Supposing in any building in question there was an alleged excess of height at the north-west corner, is one in determining whether that is an excess of height or not to look and see what is the height of something at the south-east corner? It seems to me that it was not the intention of the Act that any such method should be adopted. Take, for instance, the centre of a building. It is usual for the centre of a building to be raised considerably higher than either side of it, and the question arises, Does that centre exceed in height? In answering that question the walls of that centre must be considered, and not the walls of the two sides about which there is no question.

Now, read in that way, what is the meaning of the section? With reference to the erection of new buildings it says, "No new building shall be erected on the side of any such street"—in this case the side of Salem Road—"so that the height of such building shall exceed the distance of the front or nearest external wall of such building from the opposite side of such street," that is to say, the street by the side of which the building is erected. If the subject for consideration is the height of the new building, and that means the height of the part which is being examined, it follows that what has to be considered is the front or nearest external wall of that part. The contrary contention is that in considering the height of that part of the building which is said to offend against the provisions of the Act regard is to be had to the wall of some other part of the building, which is called the wall of the building. It seems to me impossible to say that that is what is to be done. It is the front or external wall of the part of the building which is alleged to offend against the restrictions of the Act that has to be considered. There is no difficulty in having a front external wall of a part of a building. There may be a difficulty—though the expert witnesses, I think, thought otherwise—in saying that there is more than one front wall of a building taken as a whole, but there is no difficulty in saying, when considering one particular part of the building, what is the front wall of that particular part. It may or may not be the front wall of the

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KEKEWICH building taken as a whole, but it is the front wall of that particular part. There is an alternative given in the Act, "the front or nearest external wall." I confess that I have not been able to satisfy myself what the meaning of the alternative is, or how the alternative could be applied to this or any other case which I have been able to represent to myself, but I do not think that is an obstacle to the construction which I propose to put on the Act, because if I do not require the alternative, which I do not, there is really no necessity for considering what the alternative would be if there were the necessity of resorting to it.

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This building fronting by the side of Salem Road is certainly not uniform. In the first place, there is a recessed part, and the recess goes back to the depth of about twenty-three feet. The recess has three walls, that is to say, two wings and a wall which faces the street, and is clearly to my mind the front wall of that part of the building. If to that twenty-three feet is added the width of the street on the side of which the building is erected, there is an entire width of sixty-three feet, and it is not argued that the building in that recessed part exceeds in height sixty-three feet.

Then, secondly, further up Salem Road there is a building with a gable. This building is pushed forward from the main building, and is at a lower height than the main building. What a gable has to do with it depends upon the 21st sub-section of the 5th section of the Act, to which I will refer presently, but if it is a gable—and there is no case made now that it is not a gable—the measurement for the purpose of ascertaining the height can be made from the ground to the base of the gable, and, so long as the height so measured does not offend, there is no offence against the restrictions of the Act. It is admitted that from the level of the ground to the base of the gable is only forty feet, and, taking that alone, there is no offence against the provisions of the Act.

There is more difficulty about the third and remaining part. Beyond the gable building there rises again the main building, that is to say, the roof of the gable does not quite cover the whole of the building beyond; but there comes another part of the building, which is certainly far higher, and will offend against

the restrictions of the Act, if the height of the gable building is taken as the governing height, that is to say, forty feet only. But there, again, it seems to me that that is another part of the building, and it must be considered as if it stood alone. The recessed part and the gabled part must be taken separately, and then the question considered how far this one or that one really offends against the restrictions of the Act as laid down in s. 49.

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This building has a front wall. It is perfectly true that that front wall does not start from the level of the ground. It starts some forty feet above the level of the ground, but it is the front wall of that particular building, and it is, of course, the external wall. If my construction of the Act is correct, the result is that the measurement must be made from that, and the Act says how it is to be done. The measurement is not made in an oblique line from that wall down to the opposite side of the street, but, taking a vertical line to begin with down to the level of the ground and starting from that, the measurement is made from that latter point to the opposite side of the street, and when that is done it will appear whether the restrictions of the Act have been properly observed.

Now the main answer to that is that it enables a house to be set back, and that it cannot have been, and was not, the intention of the Act to permit that. It is said that it would be possible to begin with a low building immediately abutting on the side of the street which could not possibly offend against the restrictions of the Act, and then at a convenient distance behind, that is to say, leaving room to cover a shop or a small dwelling-house, a new erection might be begun, and according to the contention which I have adopted the width of the street might be added to the depth of that low building, with the result that the back part might be raised far above the height to which it would be lawful to raise the front part, and that operation could be continued indefinitely, and so there would be a house built in steps, each step having its own front wall, and being entitled to have its height measured according to a different standard. I do not myself see where the Act says anything against that, and why it should not be. At any rate, it is sufficient for me to say that, if the ingenuity of architects can build a house in that way and

KEKEWICH J. yet keep the height of each part within the limits, I see no reason on the face of the Act why that should not be done.

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I have said that I must refer to s. 5, sub-s. 21, but I may do so very briefly, because really all difficulties about that have been cleared away. There is now no difficulty about the point from which the measurement is to be made. It is agreed that, whether the measurement is taken from the level of the ground in Moscow Road or the level of the ground in Salem Road, the difference is so small that it cannot be of any real advantage to either one side or the other, so that there is no need to consider that. Therefore what is meant by "immediately in front of the centre of the face of the building" may be left undetermined. Then the measurement is to be taken from the point, determined in the manner I have already indicated, to the level of the top of the parapet. Now I do not think it is necessary to find where the parapet of the recessed portion is, nor is it material, because it is not alleged that the height, on my construction of the Act, is exceeded. The same remark applies also to the third portion in my enumeration. But as regards the gable a different rule has to be applied. There there is no parapet. It is perfectly clear on the evidence that what is placed on the top of this gable is not a parapet. Where there is no parapet the measurement is to be to the level of the top of the external wall, or in the case of a gabled building to the base of the gable. The meaning of that is this, as I read the Act: In the first place, the cases to be considered may be divided into two classes—one where there is a parapet, and one where there is not a parapet. Then the second division, where there is no parapet, may be again subdivided into two classes—where there is a gable, and where there is no gable. If there is a gable, then the height is measured to the base of the gable. That is the case here, and one need not assert the other. That seems to me to dispose of the case.

That being so, it is unnecessary to determine whether, in the events which have happened, any relief ought to be granted to the plaintiff by reason of what is called laches. I venture to submit that "laches" is not the proper term to apply, but there is certainly room for argument that, though "laches" is not applicable, the Attorney-General may be precluded from suing by

reason of delay under such circumstances as to raise an equity in the defendant as against any person attempting to interfere with him. It is a grave question whether the Attorney-General is in any way bound by the doctrines of equity applicable to such a case. In the circumstances, however, the question has become purely academic, and therefore I shall not discuss it.

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The result of my judgment is that the defendants succeed, and there will be judgment for them with costs.

Solicitors: *Gibbon & Moore; Roche, Son & Neale; Clinton & Co., for J. Pierce, Nottingham; Bircham & Co.*

R. M.

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20, 21, 22, 25,
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NOTICE.

In the case of *In re Wagstaff, Wagstaff v. Jalland*, reported ante, p. 35, the names of *A. R. Ingpen, K.C.*, and *Vaughan Hawkins*, as counsel for the trustee of the testator's will, and the name of *W. Frampton*, who appeared with *E. F. Buckley* for a defendant, were inadvertently omitted.

G. M.

residuary estate :—

Held, that the testator meant to use the word "widow" in a secondary sense, and upon the true construction of the will the lady was entitled to a life interest in the residuary estate, unless and until she contracted a marriage subsequent to the death of the testator.

By his will dated March 31, 1897, James Poole Wagstaff, of Manor Park, Potton, in the county of Bedford, and of Gransden

KEKEWICH Lodge, Highbury Crescent, London, gave all his furniture, household goods, chattels and effects in and about these two residences to his dear wife Dorothy Josephine Wagstaff (the same person as the defendant Josephine Jalland) for her own absolute use and benefit, and, after giving an annuity to his housekeeper and various pecuniary legacies, the testator devised and bequeathed all his real and personal estate not thereinbefore disposed of to his said wife, Charles James Noble and Charles James Pope, upon trust to sell and convert the same (but as to the real estate only at the special request or with the consent in writing of his said wife) and after payment of his debts, funeral and testamentary expenses, and legacies, to invest his residuary trust estate as thereby directed; and after providing for the annuity "to pay the residue or surplus of the dividends interest and annual produce unto, or authorize or permit the same to be received by my said wife during her life if she shall so long continue my widow, for her own use and benefit; and upon or after her decease or second marriage" to stand possessed of the said residuary trust estate in trust for his children and grandchildren as therein mentioned, and upon failure of the trusts thereinbefore declared of the residuary trust estate by reason of there being no grandchildren or grandchild of his who should become absolutely entitled thereto under such trusts, then his will was that his trustees should stand possessed of the residuary trust estate "subject to any existing life estate or other interest therein, in trust for the eldest surviving son of my cousin John Wagstaff."

There was a power to the trustees to postpone conversion, and the testator appointed the said trustees to be the executrix and executors and trustees of his will.

J. P. Wagstaff died on September 2, 1903, and his will was proved on October 22, 1903, by the defendants Josephine Jalland and Charles James Noble alone, Charles James Pope having renounced probate. The testator died possessed of real and personal estate amounting to 180,000*l*. The trustees of the will postponed the sale and conversion of the real estate. Josephine Jalland remained at Manor Park, Potton, but the income of the real and personal estate was received by the trustees and retained pending the determination of the questions raised in the action.

Josephine Jalland was never legally married to the testator. On December 21, 1893, the testator went through the ceremony of marriage with her at St. George's Church, Hanover Square, but she had been in fact married on March 18, 1884, to Alfred Gibson Jalland, who was still living, and this marriage had never been dissolved. The testator and Josephine Jalland lived together as husband and wife until the death of the testator.

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The testator had only one child by the defendant Josephine Jalland, and this child died an infant before the testator. There were no children of the first marriage, and the testator had no other lawful issue. The plaintiff Berners Shelley Wagstaff was the eldest surviving son of a cousin of the testator called John Wagstaff, who was an auctioneer and surveyor residing in London, and he claimed to be now entitled to the residuary estate of the testator. The defendant John Wagstaff was a carpenter and the son of another cousin of the testator, also called John Wagstaff, who lived in the village of Potton and died in 1896.

The writ in the action was issued on July 30, 1906, and the plaintiff claimed administration of the testator's real and personal estate and a declaration that he was the person who, in the events which had happened, was now entitled to the real and personal estate of the testator.

By her defence Josephine Jalland alleged that long before and at the time of the execution of his will the testator knew that she was not his lawful wife, but had been married to Alfred Gibson Jalland, who was still living. She denied that the plaintiff was entitled to the receipt of the rents, profits, and income of the testator's estate. The second defendant, John Wagstaff, claimed that his father was the "cousin John Wagstaff" mentioned in the testator's will.

On November 19, 1906, Mrs. Jalland surrendered herself at a London police-court on a confession of bigamy, and on January 10, 1907, she received a nominal sentence of three days' imprisonment.

A large number of witnesses were called on the two issues of fact which were tried first, namely, (1.) which was the cousin John Wagstaff intended by the testator, and (2.) whether the

KEKEWICH testator when he went through the ceremony of marriage with
 J. Mrs. Jalland knew as a fact that she was the wife of A. G.
 1907 Jalland. The Court decided the first issue in favour of the
 WAGSTAFF, plaintiff, and the second in the affirmative.
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WAGSTAFF The question of law was then argued as to whether Mrs. Jalland
 v. was entitled to any and what interest in the testator's estate.
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P. O. Lawrence, K.C., Rufus Isaacs, K.C., and P. Wheeler, for the plaintiff. If the gift had been simply "to my wife Dorothy Josephine Wagstaff during her life" there is no doubt that she would have taken, but the difficulty arises from the added condition, "if she shall so long continue my widow." If the testator did not know that she was already another man's wife, then we submit that it is clear that she cannot take. But it will be contended on her behalf that he did know that she was a married woman, and that a secondary meaning must be given to the words "wife" and "widow." In answer to that contention we submit that she ceased to be his widow, even in a secondary sense, when she had to drop his name and publicly announce that she was no longer his widow and was convicted of bigamy. She cannot in those circumstances fulfil the condition as being the person living as his widow in the secondary sense. If it should appear that there was any fraudulent misrepresentation on the part of the defendant, this Court, in the circumstances, would have no jurisdiction on any question affecting the validity of the bequest: *Meluish v. Milton*. (1)

It is a matter of construction pure and simple whether the word "widow" has any other than its ordinary meaning, but its meaning may be altered by the fact that the testator knew when he made his will that she was not his lawful wife. This case is covered by *In re Boddington* (2), and the words of Lord Selborne L.C. "that the status of widowhood is a condition of the inception and a measure of the duration of the gift" are directly in point. It is a condition which the defendant must fulfil, and if she cannot she is not entitled to the gift. In *Lepine v. Bean* (3) there was a gift of income to the testator's wife M. for life provided

(1) (1876) 3 Ch. D. 27.

(2) (1884) 25 Ch. D. 685, 687.

(3) (1870) L. R. 10 Eq. 160.

she should so long continue his widow and unmarried. M. was not his legal wife, but Lord Romilly M.R. held that she was entitled during her life or until she should marry. That is the converse case, and was not cited in *In re Boddington* (1), which is a decision of the Court of Appeal and of later date.

Levett, K.C., Horace Ivory, K.C., J. G. Wood, and Somers James, for the defendant Mrs. Jalland. This is a gift of a life estate with a condition which is impossible of fulfilment, therefore the gift remains: Sheppard's Touchstone, 7th ed. vol. i. p. 122. According to the definition in Fearn, 10th ed. vol. ii. ch. 1, p. 4, it is strictly a mixed condition subsequent. In *In re Boddington* (1) the words which created the gift were the words of widowhood, and the status of widowhood was a condition of the inception of the gift, and, as pointed out by North J. in *In re Lowe* (2), the period named by the testator in *In re Boddington* (1) never began or ended. In this case there is a gift to the defendant by name for life "if she shall so long continue my widow"; that means if she shall continue his widow in the same way in which she would continue his widow if she were his legal wife: *In re Lowe*. (2) In *Lepine v. Bean* (3), which was a case somewhat similar to the present, a married man was living with a single woman to whom he gave the income of his residuary estate during her life "provided she should so long continue his widow and unmarried," and it was held that she was entitled to the income so long as she should continue unmarried. Neither in that nor in the present case could there have been a legal widowhood. The testator made this will knowing that the defendant was not his legal wife, and the very first gift to her shews that, though she was not his legal wife, he was going to treat her as his wife. Then the trust for conversion with her consent, the gift of the life interest to her, the trusts for the children, and the ultimate gift over all go to shew that he meant her to take. The testator could not have meant legitimate children by her, because the very fact that would enable him to have legitimate children by her, namely, a legal marriage, would of itself have revoked the will. We submit that she is clearly entitled, both

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(1) 25 Ch. D. 685.

(2) (1892) 61 L. J. (Ch.) 415.

(3) L. R. 10 Eq. 160.

KEKEWICH on the true construction of the will and on the authority of

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Lepine v. Bean (1) and *In re Lowe*. (2)

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E. F. Buckley, for another defendant.

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P. O. Lawrence, K.C., in reply. The gift is really a gift

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with a limitation; it is not a condition.

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[KEKEWICH J. I agree, and need not trouble you as to that.]

Here the word "widow" must be construed strictly, namely, as applying to a person who has had a husband who is dead. The words "second marriage" confirm that view and must be similarly construed, and the lady, never having fulfilled the condition of widowhood, cannot take. But, assuming that the Court will attribute a secondary meaning to the word "widow," then the true secondary meaning intended by the testator would be, "so long as she fulfils the character with which I have clothed her as my widow." It would be entirely inconsistent with that secondary meaning that she should live at the manor-house as Mrs. Jalland. She has renounced the character with which Mr. Wagstaff has clothed her, and by her voluntary confession of bigamy has published to the world that she is not the widow of the testator. The only common-sense conclusion is that the testator intended her to have the income so long as she remained Mrs. Wagstaff, and if she became Mrs. Jalland again in the eyes of the world then the income was to cease. The only other alternative is to say that the widowhood would last until she contracted a legal marriage with somebody else, but that is a construction which cannot be put upon the will. By a "second marriage" the testator means some act which will do away with the state of widowhood which he has annexed as a limitation of the gift. The gift here during widowhood meant so long as she lived apart from her husband A. G. Jalland, and so long as she did not marry again. If that is the true view, the testator annexed to the gift a condition which the law will not allow. In the case of *Lepine v. Bean* (1) that difficulty did not arise, because the gift there was to a single woman, and it could be done. If, therefore, there has been a failure of the life estate, the plaintiff takes as the eldest surviving son of the testator's

(1) L. R. 10 Eq. 160.

(2) 61 L. J. (Ch.) 415.

cousin John Wagstaff. The widow's life estate never existed. In the case of *In re Boddington* (1) there was a gift by a testator to his wife of an annuity "so long as she shall continue my widow and unmarried." The marriage having been declared null by the Divorce Court after the date of the will, it was held that, as the lady did not fill the position of the testator's widow, she could not take the annuity. Mrs. Jalland cannot take here for the same reason. In *In re Moore* (2), where all the cases were gone into, the gift was to a woman so long as she lived apart from her husband, and it was held that such a gift was bad. If the testator meant here that widowhood meant so long as Mrs. Jalland lived apart from her husband A. G. Jalland—that is, as a grass widow—then that vitiated the whole gift. It is a gift contra bonos mores. Whatever else widowhood may mean it cannot mean here that she should live with her husband on the testator's bounty.

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KEKEWICH J. My duty now is to construe an apparently simple will. The clause containing the ultimate gift struck me from the first as one which was not drawn so as to remove objections or difficulties on the face of it to the construction. But I am not concerned for the moment with that ultimate gift. [His Lordship briefly summarized the scheme of the will.] But for one unfortunate fact the will, so far as I am dealing with it, would never have come before the Court at all. The first thing to consider is who is to take the first estate for life. Immediately you find there is a misdescription; "My dear wife Dorothy Josephine Wagstaff" is not Dorothy Josephine Wagstaff at all; her name is not Dorothy, and she is the wife of Alfred Gibson Jalland. Immediately you find that you are put into a very awkward position, and you are obliged then to examine the circumstances under which the will was made—to seat yourself in the testator's chair and endeavour, as far as possible, to see what is the necessary meaning of the language which he has used, having regard to all the circumstances which he must be presumed to have had under his eye. Now, for this purpose I am treating the will as the man's own will. Of course I

(1) 25 Ch. D. 685.

(2) (1888) 39 Ch. D. 116.

KEKEWICH remember that it is what is called "a lawyer's will," but it is the
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testator's own language, and it is his language that I have to interpret. I know that he was living with this lady as his wife, and that he knew she was not his wife, but the wife of another man. I have found that as a fact. I know a great deal more about this testator—I know the life he led, and how he came to go through the ceremony of marriage with this lady. I do not wish to have in my own mind anything that may not be presumed to have been in his mind; he must have remembered how he applied for a licence to be married at St. George's, Hanover Square, and he must have remembered generally all that took place after that time, the life of constant deceit which he had been living—the constant fear that he had been in lest it should be discovered that after all he was living with another man's wife, and not with his own wife. It seems to me that I must conclude a determination on his part to brave it out to the end, to be determined that even in his last will, which was not to be looked at except by his solicitor until after his death, he should assume the rôle of the married man, taking care of his dear wife. He employed a solicitor, but he determined to tell his solicitor no secrets; it was foolish, and more than foolish—extremely cruel to the lady whom he desired to benefit, to whom he owed so much—but he determined to die as the husband of the lady with whom he was living. That is his view. A few words or a hint to his solicitor would have saved it, but the hint was not given. That being so, he makes this will in which, subject to this annuity, he gives her, in the first instance, the whole contents of his two houses, and no one suggests that does not pass all to her. Therefore, whatever else she is, she is the *persona designata*, and no one can doubt that was a perfectly good gift to her by name. Then he proceeds to deal with the rest of his estate, and that is given to her "to be received by my said wife during her life if she shall so long continue my widow." Then it is given over, after her decease or second marriage, to the children, whom he must have known, under the general law, could not have taken any property under this will. He had had no children by this wife in a legal sense, and he could not have had other children without another marriage which would have revoked this will. I do not think it part of my duty to consider

whether any children by Mrs. Jalland, if he had had any, could have taken under this gift—that is another matter—but he must have known that they could not have taken as his children in the ordinary construction of the word. After the gift of the contents of the two houses to “his dear wife Dorothy Josephine Wagstaff” he gives this life interest in the rest of his property, annexing thereto this limitation, “if she shall so long continue my widow.” I do not propose to say more about the argument that that is a condition which may be rejected than that I do not accept that view. To my mind this is only part of the limitation, not a conditional limitation in the sense generally used, but a limitation importing a condition, but not a condition itself. Now, did he mean to use the word “widow” in the strict sense? If that is the proper construction, the case falls under the case of *In re Boddington* (1) and she can take nothing. But I pass that by. Did he mean to use the word in its strict sense? It would have been a cruel mockery, and something worse, for this testator to have sat down and made such a will as this, making a bequest to her of the contents of the houses, and then continuing in language which says, on the face of the will, “till the facts are known this lady shall be tenant for life, but if the facts are known she shall take nothing.” I think I am not bound to attribute any such intention to the testator. It seems to me to be contrary to all rules, and to all that I know about the testator. He intended to provide for her, and he cannot have intended in providing for her to take away the income in the very words in which he professed to give it. Therefore I must hold that, when he says “if she shall so long continue my widow,” he means to use that word in a secondary sense. I think also, as regards the words “after her death or second marriage,” he cannot mean really there a marriage as contrasted with the marriage with himself, because he knew there was no marriage. It is not a marriage like that at St. George’s, Hanover Square, but a marriage of some other character. It has not been suggested that a man may not use “widow” in a secondary sense. A testator is at liberty to use even technical words in a secondary sense. He knew

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(1) 25 Ch. D. 685.

KEKEWICH that she could not be his widow in the ordinary, proper sense of the word; he knew that there could not be a second marriage in the ordinary sense of the word as annexed to widowhood, and I must take him to have intended those words in a secondary sense of some kind or other. Now I agree that when you have arrived at that then you embark on a considerable difficulty. What did he mean by widow? What is suggested is that the testator meant "so long as she shall fulfil the character with which I have clothed her"—those are the words of the argument—that is to say, so long as she lives as Mrs. Wagstaff and remains in occupation of Manor Park, Potton, receives my income in that character, and fulfils the position which my relict ought to fulfil. Then it is said she has not done that; she does not fulfil that condition and that character; she has ceased to be Mrs. Wagstaff in the eyes of the world. Counsel pressed me very much with this, that she had done it voluntarily; that therefore I am to say she does not continue to be his widow, because of her own free will she has ceased to fulfil the character with which I have clothed her. Would it have made any difference if the real facts had been discovered and she had been prosecuted in the ordinary course, and not because she had surrendered herself? I do not see the difference. She would still have ceased to fulfil the character with which he had clothed her, and there would have been no voluntary act on her part; she might have pleaded not guilty, she might have defended it, and been convicted only after serious argument. But the result would have been the same. I do not think that argument bears the test of the application of facts; I do not think that is an interpretation of the words "so long as she shall continue my widow" such as will fit the expression, especially bearing in mind that he says "after her decease or second marriage." That will not help it; the second marriage does not become possible any the more because she has surrendered herself, or because she is now ascertained to be Mrs. Jalland. I reject that interpretation. Then *In re Moore* (1) is cited, and I am asked to hold that he means "unless and until she re-unites herself with her husband." I am not sure that there is any substantial difference

between that and the other suggested interpretation, “so long as she shall fulfil the character with which I have clothed her.” It seems to me to be very much the same thing. In short, it means this—“I call her my widow, and I mean her to live as my widow; so long as she lives as my widow, then in that meaning she is to have my property”; and I am far from saying that it is not a possible view, apart from the construction of the words. He may very well have thought, “I will provide for her so long as she keeps up my good name, and takes care that nobody knows that really we were not man and wife at all, but she was the wife of another.” But she might do that, of course, by living again with Mr. Jalland, or commencing for the first time to live with Mr. Jalland as his wife, and she could not do that without ceasing to be Mrs. Wagstaff, at any rate in the eyes of the world. I cannot myself think that that is a reasonable interpretation of the will. I again apply the words of the gift over, “after her decease or second marriage.” He does not use any language from which I can extract it even after she has ceased to fulfil the character with which he had clothed her, either by proclaiming herself as the wife of Mr. Jalland or by re-uniting herself to him. There are no words which hint it at all. It is “after her decease or second marriage.” The only thing he has told us that he is thinking of is “decease or second marriage.” We are not dealing with decease, so I may say the only thing he is thinking of is second marriage. That he does tell us. She is to have his life estate so long as she shall continue his widow, and one thing, and one thing only, is to give it over to others, namely, a second marriage. It seems to me that there I have the key, and that I am on safe ground if I take that key and apply it to unlock what otherwise is, no doubt, a very tightly fastened door. I must find some way out of it. I am not at liberty to say that he meant nothing. If he does use the word “widow” in a secondary sense, my duty is to find out what is the secondary sense. I think I have got it there. Rejecting the other interpretations, I say that what it means is this—“Unless and until she contracts a marriage subsequent to my death.” Whether that was really in his head or not is not for me to say. I think that is the only meaning which I can put on the words which he has used.

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KEKEWICH J. Having regard to all the circumstances under which those words were used, I propose to declare, that on the true construction of the will, and in the events which have happened, Mrs. Jalland is entitled to the life estate given her by the will unless and until she contracts a marriage subsequent to the death of the testator.

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The plaintiff must pay the costs of Mrs. Jalland and the trustee Mr. Noble.

Solicitors: *George Brown, Son & Vardy; Fooks, Chadwick, Arnold & Chadwick; Harry Wilson; W. T. Coventon.*

G. M.

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In re SALAMAN.DE PASS *v.* SONNENTHAL.

[1907 S. 528.]

Will—Construction—Vested Legacies—Interest until Payment—Infants—Appropriation—Payment into Court—Gifts to Persons “born” previously to Date of Will—Infant “en ventre sa mère”—Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 42.

By his will dated October 17, 1904, a testator, after giving a number of legacies, gave 500*l.* to each of his great-nephews and great-nieces “born previously to the date of this my will,” to whom no other pecuniary bequest had been given by his will. He then gave his residuary estate to trustees upon trust for sale and conversion, and out of the proceeds to pay testamentary expenses, debts, and legacies and divide the net residue as therein mentioned; and the testator empowered his trustees to postpone the sale and conversion, and the payment of legacies until after sale and conversion, but he declared that all legacies not paid within a year from his death should carry interest at 4*l.* per cent. A large number of the legatees were infants. One of the great-nieces was not born until March 14, 1905, and was thus *en ventre sa mère* at the date of the testator’s will:—

Held, that the trustees could not free the residue by setting apart proper securities to answer the legacies to infants, but they could pay the legacies into Court under s. 42 of the Trustee Act, 1893, when the clause as to the payment of the 4 per cent. interest would cease to operate.

Held, also, upon the true construction of this will, that the child “*en ventre sa mère*” was not entitled to a legacy, as the persons whom the

testator intended to benefit were persons of whose existence he knew, namely, those "born," in the ordinary sense of the word, at the date of his will. KEKEWICH
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By his will dated October 17, 1904, Nathan Salaman, after appointing the plaintiffs his executors and trustees, gave numerous specific and pecuniary legacies, including the following: "To Herbert Nathaniel Davis, the son of my niece Isabel Davis, the sum of 700*l*. To my great-niece Mabel Eltlinger, the sum of 500*l*. To each of my great-nephews and great-nieces (children of my nephews or nieces) born previously to the date of this my will, to whom no other pecuniary bequest is given by this my will, or any codicil thereto, the sum of 500*l*." ; and he declared that the receipt of any female legatee for any legacy should be a good discharge for such legacy, notwithstanding the infancy of such legatee. The testator then gave, devised, and bequeathed the residue of his real and personal estate to his trustees upon trust for sale and conversion, and out of the proceeds of such sale, and all other moneys forming part of his residuary estate, to pay his funeral and testamentary expenses, and debts, and the legacies bequeathed by his will or any codicil thereto, and to stand possessed of the net residue of the estate upon the trusts therein stated, "provided always and I hereby declare that it shall be lawful for my said trustees, in their absolute discretion, to defer and postpone the sale and conversion into money of the whole or any part of my real and personal estate so long as my trustees in their absolute and uncontrolled discretion may think proper, and may postpone the payment of all or such of the said legacies as they shall think proper until after such sale and conversion shall have taken place, but I declare that all legacies not paid within a year from my decease shall carry interest at the rate of 4*l*. per cent. per annum." The testator died on April 19, 1905. Herbert N. Davis and Mabel Eltlinger were both under twenty-one, and there were upwards of thirty great-nephews and great-nieces of the testator who took legacies under the will, and nearly all of them were infants. One of the great-nieces, the defendant Daphne Salaman, was born on March 14, 1905, five months after the date of the testator's will ;

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KEKEWICH and was thus en ventre sa mère at that date. The testator's estate consisted to a great extent of freehold and leasehold properties, which had not been realized, and investments in stocks and shares. The defendants were representatives of the two classes of residuary legatees and infant legatees. An originating summons was taken out by the trustees, asking (inter alia)—

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(a) whether, upon proper appropriation being made by the plaintiffs to answer each of the legacies to infants, such infants would be respectively entitled to the income of the funds appropriated respectively for them, so as to exclude the operation of the clause in the will under which legacies not paid within a year from the testator's decease should carry interest at 4l. per cent.; (b) whether the plaintiffs might properly pay the legacies to infants into Court, pursuant to s. 42 of the Trustee Act, 1893, and whether, upon such payment, the clause as to interest at 4l. per cent. would cease to operate; (c) whether the defendant Daphne Salaman was entitled to a legacy of 500l.

Maugham, for the trustees of the will.

W. H. Draper, for the residuary legatees. Upon the construction of the will the testator only meant the clause as to the payment of 4l. per cent. upon legacies to apply to the delay which might ensue from the exercise by the trustees of their discretion to postpone conversion. The trustees may appropriate proper securities to meet these legacies to infants, which are all vested legacies.

In the case of *In re Hall* (1), which was a case of contingent legacies, it was decided that if an executor properly invested a reasonable amount to secure such a legacy he might then distribute the residue of the estate, and would not be held personally responsible if the investment turned out to be insufficient. So also in *Fraser v. Murdoch*. (2) But if there is no power to appropriate, the trustees have power to pay into Court under s. 42 of the Trustee Act of 1893, which repealed s. 32 of the Legacy Duty Act, 1796 (36 Geo. 3, c. 52), and in that event the 4l. per cent. interest would cease. In the case of *Abraham v. Holderness* (3) an infant's legacy was paid into Court,

(1) [1903] 2 Ch. 226, 233.

(2) (1881) 6 App. Cas. 855, 864.

(3) (1842) 6 Jur. (O.S.) 290

and the legatee was held to be only entitled to the interest on the money in Court, and not to the higher rate provided for by the will. In *Rimell v. Simpson* (1) an infant's legacy was invested in Consols, and it was held that it should have been paid into Court under the Legacy Duty Act.

H. Burrows, for infant legatees. The testator has here provided for the exact case which has happened, and so long as the legacies to infants are unpaid 4l. per cent. interest must be paid. He has contemplated that his estate might be kept intact. But it is submitted that there is power to invest in trust securities the amount of each legacy. That is the view taken by the text-books of authority. Payment into Court would not be so beneficial for the legatees, owing to the expense.

KEKEWICH J. In this case the arguments have been by no means without interest. I think, however, that the actual language of the will has been left more out of sight than it ought to have been. The testator left a number of pecuniary legacies, with which alone I am concerned, and then he gives all his residue to trustees upon trust for conversion, and out of the proceeds of sale and any other moneys in their hands they are to "pay the testamentary expenses, and debts, and legacies, bequeathed by this my will." He then distributes the residue, the residuary legatees being entitled to nothing but the proceeds of sale, and that subject to the testamentary expenses and legacies. He then puts in a very wide power of postponement, intended, of course, to enable the administration of his estate to be conducted in a proper manner. But he remembers that he has provided for payment of legacies, and if the sale is postponed the payment of legacies will also be indefinitely postponed; and accordingly he provides that "all legacies not paid within a year of my decease shall carry interest at 4l. per cent." In other words, the legatees are not entitled to insist upon a sale in order that their legacies may be paid; they cannot interfere with the discretion of the trustees, but they are compensated for that by payment of interest at the rate of 4l. per cent. per annum until payment. The only question I have really to decide is what is "payment." Now,

(1) (1848) 18 L. J. (Ch.) 55.

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it is said that if the trustees put aside a sum of Consols, or any other proper securities to meet any given legacy, that is payment, and thenceforth the legacy will not carry interest. That seems to me to be thoroughly unsound. If you have a legatee competent to make a bargain, you may make a bargain with him, not to insist upon payment in cash, but to take over any trust securities at their market value, and so to pay him. If you have not got a competent person to give a receipt, you cannot make a bargain. Take the case of an infant. What can you do? Can you put aside a certain sum and say that is the legacy? The judgment of Romer L.J. in the case of *In re Hall* (1) says that you can do that so as to free the trustees from personal responsibility, as the trustees might be in an awkward position. They may wish to distribute the residue, but because some legatee is abroad, or is not for the moment competent to give a discharge or is an infant, they do not know what to do so as to arrive at a conclusion of what residue they have to distribute. They may set aside a certain amount of cash and invest it in trust securities, or they may set aside a certain amount of trust securities at the proper market price of the day. In so doing the Court will hold them free to exercise their proper discretion, and will not make them personally responsible. It is quite different from payment; that would not free the residue. If the trustees have distributed the residue no claim can be made against them, but the residuary legatees cannot say to the legatee, in the event of the price of the securities set apart having fallen and the money not being forthcoming, "You are satisfied; you have been paid." The legatee is entitled to say, "I want cash; I will take the security at the market value of to-day, but I will not have the security at the market value several years ago, when the appropriation was made without my authority." There is no decision, or even a dictum, in any case which will authorize that. If the trustees want to free the residue, that is, to prevent the residuary legatees from being liable, they must either get the consent of the legatee himself to the appropriation, or obtain some authority from the Court in an administration action to pay it. Then it is suggested that the money may be

(1) [1903] 2 Ch. 226, 233.

paid into Court under the Trustee Act, 1893, which takes the place of the Legacy Duty Act of 1796. Now s. 42 of the Trustee Act, 1893, says that "trustees having in their hands or under their control money or securities belonging to a trust"—and to hold money for an infant is a trust within the meaning of the Act—"may pay the same into the High Court"; and sub-s. 2 of the same section says that "the receipt or certificate of the proper officer shall be a sufficient discharge to trustees for the money or securities so paid into Court." The testator does not say that the legacy must necessarily be paid to the person entitled. There may be instances of assignment by the legatee, or there may be a trustee in bankruptcy, or there might have been a payment possibly to a husband in right of his wife, or to the executors of a legatee. The Act of Parliament says that the proper officer of the Court is the person entitled to give a discharge. I have no doubt that payment into Court under the Trustee Act would be "payment," and on that being made the interest would cease. The legatee would have the interest on the money invested in Court. Short of that I do not see how payment can be made to the infants during their infancy. There will therefore be a declaration that the payment of interest directed by the will will not cease to operate until payment to a person entitled to give a discharge, or payment into Court under the Trustee Act, 1893.

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The question as to whether Daphne Salaman was entitled to a legacy of 500*l.* was then argued.

H. Burrows, for Daphne Salaman. The point is really concluded by *Trower v. Butts*. (1) There was a gift in that case to persons "born in the lifetime of the testator," and it was held that a child *en ventre sa mère* at the time of the testator's death was included in the legatees, although not born until several months afterwards. In the case of *Villar v. Gilbey* (2) it was said that the rule would be applied when it was for the benefit of the child, and not otherwise. Here, however, it is manifestly for

(1) (1823) 1 S. & S. 181.

(2) (1907) 23 Times L. R. 392; since reported [1907] A. C. 139.

KEKEWICH the benefit of the child that it should be applied. The infant, therefore, being en ventre sa mère at the date of the death of the testator, must be taken to have been "born" at the time and entitled to a vested legacy of 500*l*.

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W. H. Draper, for the residuary legatees. Daphne Salaman is not entitled to the legacy. In *Blasson v. Blasson* (1) the words were different, "born and living at the time of my decease"; here the words are "born before the date of this my will." In *Villar v. Gilbey* (2) the House of Lords held that the authorities did not establish any general rule of construction that "born" included a child en ventre sa mère. In this particular will the Court is free to allow the testator to be taken to mean what he says. He intends to benefit a class which is within his own knowledge, and "born" means born, as the testator says, previously to the date of his will. That is the date at which the class is to be ascertained. There are no cases in which these exact words have occurred. There is nothing in the decisions in *Trower v. Butts* (3), *Blasson v. Blasson* (1), or *Villar v. Gilbey* (2) which would compel the Court to put an arbitrary construction upon the plain words used by this testator.

H. Burrows, in reply. The case of *Pearce v. Carrington* (4) is in favour of the construction I contend for. The House of Lords in the case of *Villar v. Gilbey* (2) only differed from the Court of Appeal on one point.

KEKEWICH J. The word "born" does not in its primary sense, or, so far as I know, in its secondary or any other sense, properly include "begotten" or "conceived," but it applies only to those who have a separate existence in this world. But in the construction of wills, in order to effectuate what is the presumable, rather than the proved, intention of testators, the Courts have introduced certain glossaries of their own, and included in the word "born" a child "en ventre sa mère." The recent case of *Villar v. Gilbey* (2) I think shews this, that there is no general rule that children "en ventre sa mère" are to be treated as born

(1) (1864) 2 D. J. & S. 665.

(3) 1 S. & S. 181.

(2) 23 Times L. R. 392; since reported [1907] A. C. 139.

(4) (1873) L. R. 8 Ch. 969.

and that the rule which would give children in that condition the benefit of gifts made to them is to be construed with some jealousy, and only to be so construed where the benefit to the child is distinctly seen. In *Trower v. Butts* (1), which is not the only case by any means of the kind, the Vice-Chancellor held that a child who was “en ventre sa mère” was included in the class of the children of the testatrix’s nephew, born in the lifetime of the testatrix; and, as I understand the pronouncements of the learned Lords who took part in the decision in *Villar v. Gilbey* (2), they recognized as settled the authority of *Trower v. Butts* (1) and the other cases of the same class.

But I have to deal with an entirely different case where the testator is speaking of that which must be presumably within his own knowledge. He is speaking of those members of his family, “great-nephews and great-nieces, children of nephews and nieces,” who had been born “previously to the date of this my will.” That means “persons of whose existence I know.” It is quite possible that a man may not know personally great-nephews or great-nieces, but even if he does not, I think he must be taken to know of their existence; and here I think the testator has given us a further indication of his intention, because he has referred to them in this way, “To each of my great-nephews and great-nieces (children of my nephews or nieces) born previously to the date of this my will, to whom no other pecuniary bequest is given by this my will.” It is not suggested that he has given any legacy to this child, who was not born, but he is obviously referring to persons to whom he might have given, if he had pleased, in the ordinary way, a pecuniary bequest, and persons whom he could describe by name. I do not mean to say that it would not be possible to give a legacy to a child “en ventre sa mère,” though no Christian name could be given to it, but it is not according to the ordinary course of will-making. I think the testator here has told us, “The persons I am intending to benefit are those to whom I might, or might not, have given pecuniary bequests, as I pleased”; and then you have also the other element of

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KEKEWICH J. certainty, that they are "born previously to the date of this my will."

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I cannot conceive that this testator contemplated, as the Vice-Chancellor thought the testatrix in *Trower v. Butts* (1) did contemplate, that somebody should take who was not yet in the enjoyment of a separate existence.

Recognizing the authority of *Trower v. Butts* (1) and the other cases of a similar class, and recognizing *Villar v. Gilbey* (2) only for the purpose for which I have quoted it, I decide this point upon the construction of this particular will, and hold that only those who were born, in the ordinary sense of the word, at the date of the will can take legacies thereunder.

Solicitors: *McKenna & Co., for all parties.*

G. M.

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April 19.

In re BAYLIS, A SOLICITOR.

Solicitor and Client—Costs—Taxation—Lease—Covenant for Renewal—Costs of investigating Lessee's Title—Practice—Scale Fee—"Business connected with Lease"—Solicitors' Remuneration Act, 1881 (44 & 45 Vict. c. 44)—General Order under Solicitors' Remuneration Act, 1881, r. 2 (b), (c), Sched. I., Part II.

A perpetually renewable lease granted by the City Corporation contained a covenant that the lessors would make the renewals "at the request, costs, and charges of the lessee." The lessors incurred certain costs in investigating the title of applicants for a renewal, and these were disallowed on a taxation:—

Held, that the words of the covenant meant that the lessors were to be at no cost, and therefore the lessors were entitled to the costs which were reasonably and necessarily incurred in such investigation of title.

Held, also, that such costs were not covered by the scale fee charge "for preparing settling and completing lease and counterpart" under the General Order made under the Solicitors' Remuneration Act, 1881.

Until it was ascertained that the applicant for a renewal was entitled thereto, the "business connected with" the lease referred to in r. 2 of the General Order had not been reached.

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By a lease dated October 22, 1892, the Corporation of London demised to George Tunley certain premises in Central Street and

(1) 1 S. & S. 181.

(2) 23 Times L. R. 392; since reported [1907] A. C. 139.

Seward Street, St. Luke's, in the City of London, for a term of KEKEWICH
 sixty-one years, at a rent of 11*l.* a year and a fine of 21*l.* payable
 on renewals.

The covenant as to renewal was as follows: "And lastly that they, the lessors, and their successors, shall and will, at the request, costs and charges of the lessee, his executors, administrators, or assigns, at the end of fourteen years to be computed from the Feast Day of St. Michael the Archangel in the year 1902, execute a new lease of the said hereby demised premises at and under the same rent, and with the like provisoes, conditions, and agreements as are herein contained, unto the lessee, his executors, administrators, and assigns, for a term of sixty-one years to commence from the expiration of the said fourteen years, and so from time to time for ever, at the end of every fourteen years, he or they paying for every such renewal into the Chamber of the said City the sum of 21*l.* by way of fine, together with all arrears of rent, and executing a counterpart of every such renewed lease."

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There was also a covenant by the lessee to register all deeds with the lessors.

George Tunley died on February 8, 1897, having appointed three executors and trustees.

On October 18, 1899, new trustees of the will were appointed. The probate of the will was registered with the City Lands Department of the Corporation on September 20, 1899, and the deed of appointment of new trustees was also duly lodged with the same department on November 2, 1899, and fees were paid. Notice of Mr. Tunley's death was given to the Corporation and ground rent was paid by the trustees. In 1906 the trustees of the will applied for a renewal of the lease of October 22, 1902, in accordance with the covenant. An abstract of title was supplied to the comptroller of the Chamber of the City of London, Mr. E. A. Baylis, and consisted solely of the probate of the will and the deed of appointment of new trustees. Before completion the comptroller sent to the lessees a signed bill for 17*l.* 19*s.* 8*d.*, made up of 10*l.* scale fee for lease and counterpart, and the balance consisting of items for investigation of title, searches, and 2*l.* 2*s.* for surveyors' fees for new plans. This last item

KEKEWICH was not disputed, but the trustees objected to the items other than the scale fee, and paid under protest. The new lease was granted on November 1, 1906, and with the exception of one new clause was a mere copy of the former lease, with the names of the trustees substituted for that of George Tunley. On November 13, 1906, a consent order for taxation of the bill was made, and the taxing Master struck out all the items relating to investigation of title and attendances at the land registries on the ground that they were "business connected with the lease," and that there was no covenant to pay these in addition to the scale fee. The amount thus taxed off was 4*l.* 15*s.* 2*d.* On February 12, 1907, objections to the taxation were lodged by the comptroller, and on March 14, 1907, the Master filed his answer in favour of the lessees, considering, on the authority of *In re Allen* (1), that the costs of the investigation of title were covered by the scale allowance.

On March 15, 1907, a summons was taken out by Sir Homewood Crawford, as solicitor for the City of London Corporation, asking that the certificate of the taxing Master might be varied by allowing the items of charges for investigation of title and searches, and the bill be referred back to the taxing Master.

P. O. Lawrence, K.C., and *John Henderson*, for the Corporation. First, upon the construction of the covenant in the lease, the words "costs and charges" will include the costs which a person granting a renewed lease would incur in finding out whether he is granting it to the right person or not. The costs in dispute are necessary for the purpose of ascertaining this. The remarks of Stirling L.J. in *Lord Mostyn v. Fitzsimmons* (2) apply to the present case, and "the fair and natural meaning of the covenant is that the lessee is to pay all costs necessarily and properly incurred for the purpose of the renewal of the term." That decision was affirmed in *Fitzsimmons v. Lord Mostyn* (3), where Lord Halsbury indorsed Stirling L.J.'s observation and said that "costs" included "those things that are necessarily incurred by reason of the renewal. The landlord is to be at no cost."

(1) (1887) 34 Ch. D. 433.

(2) [1903] 1 K. B. 349, 354.

(3) [1904] A. C. 46, 48.

The costs here are necessary and properly incurred within the meaning of that decision. KEKEWICH
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The second point raised is whether these disputed costs are included in the scale fee under the Solicitors' Remuneration Order, 1881, made under the Solicitors' Remuneration Act of 1881. By r. 2 (b) of that order it is provided that "in respect of leases, and agreements for leases, of the kinds mentioned in Part II. of Schedule I. . . . when the transactions shall have been completed, the remuneration of the solicitor having the conduct of the business is to be that prescribed in Part II. of such Schedule I." Then in Sched. I., Part II., the scale fee is given for "lessor's solicitor for preparing, settling, and completing . . . lease and counterpart." Where there is an agreement for a lease followed by a lease the question whether the cost of the agreement is included in the scale fee was decided in the case of *Savery v. Enfield Local Board* (1), and it was held that the scale fee included the solicitor's remuneration in respect of the negotiations which lead up to and the agreement which preceded the lease, but it would not cover any collateral matter which was not one ordinarily within the whole transaction of the letting from its inception to its conclusion. The taxing Master referred to *In re Allen* (2), but the point decided there does not really arise here. The lessors are therefore entitled to a proper remuneration for investigating the title of applicants for a renewal.

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Ernest Todd, for the lessees. Upon the facts here there was no need for the Corporation to require an abstract of title or to investigate the title at all, because they were aware of it, all documents being registered with them under the covenant in the lease. They knew of the new trustees of the will, and had received rent from them. The taxing Master was therefore right in disallowing these items for investigation of title. As to the question whether these items are included in the scale fee, there is no contract by the lessees to pay anything at all except in the covenant to pay costs, and the Corporation can get no costs except what are given them by law. It is not strictly a covenant, but a condition upon which the lessees obtain a renewal. The

(1) [1893] A. C. 218.

(2) 34 Ch. D. 433.

KEKEWICH case of *Fitzsimmons v. Lord Mostyn* (1) was quite different. The present case comes within *In re Field* (2) and *Savery v. Enfield Local Board*. (3) In those two cases the charges for negotiations for a lease and for an agreement preceding a lease were disallowed, and it was held that the amount fixed by Sched. I., Part II., of the General Order made under the Solicitors' Remuneration Act, 1881, included these charges for negotiations and for the preparation of the agreement. There is no difference in principle between the negotiations for a lease or an agreement preceding a lease and the investigation of the title of a lessee, as in the present case. The work is of the same nature. The rule laid down by those two cases is applicable, and the disputed items of charge here are included in the scale fee charge, and the lessees are not liable to pay them.

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KEKEWICH J. With great respect to the learned taxing Master, I think he has taken an erroneous view of the claim of the Corporation of London in this case. The first point arises on the covenant in the lease, a renewal of which has been sought and obtained. As a condition of the renewal which is covenanted to be granted, the lessees agree to pay the "costs and charges" of the lessor. That is the spirit of it, although it is expressed in a different way by a covenant that the lessors will grant a renewal "at the request, costs, and charges of the lessees." Now, what does that mean?

It means, in the words of Lord Halsbury in the case of *Fitzsimmons v. Lord Mostyn* (1), that "the landlord is to be at no cost." That is reasonable enough at any rate; but whether it is reasonable or not, that is the bargain. They are to pay the costs. Now, the question is whether some costs have been properly incurred. I observe that in the Court of Appeal in *Stirling L.J.*'s judgment he said "necessarily and properly incurred," and Lord Halsbury, in the passage to which I have just referred, said really the same thing; he said "necessarily incurred." It occurred to me, when those judgments were being read, that "reasonably incurred" would have been better, but

(1) [1904] A. C. 46, 48.

(2) (1885) 29 Ch. D. 608.

(3) [1893] A. C. 218.

that criticism, if it is not an improper one for a judge to make of such high authorities, really comes to nothing. A solicitor conducting negotiations for a renewal on behalf of his client under a covenant of this kind necessarily incurs whatever costs he reasonably incurs in order to satisfy his client that he is granting the renewed lease to the proper person. He would be guilty of negligence if he did not take every proper precaution to see that the person demanding the renewed lease is entitled to it, and, therefore, what he does reasonably he does necessarily. Whatever is, therefore, reasonable in that sense seems to me to come within the costs and charges of the lessee. It need not always happen that any costs should be incurred, yet, with some trifling exceptions, costs are incurred in almost every case unless when the grant is direct to the original lessee, in which case he may be treated as the owner of the lease. But property very seldom remains in the same hands unaffected by settlements, or mortgages, or devolution of title, for a period of fourteen years, and something requiring investigation is almost sure to occur in every case. It may be the lessee is absent, and that the applicant for the renewal of the lease is the attorney of the lessee under a power, in which case it is necessary to investigate the power in order to see that it is properly executed, and to see also that it is full enough to enable you to recognize the attorney as the agent of the lessee for demanding and receiving the renewed lease. Then it is said, and with some force, that an investigation of title as regards this particular lessee cannot be necessary, because there is a covenant in the lease to register all instruments with the lessor, and he demands a fee for registration, and therefore no abstract of title would be required. There is something in that point, but that goes entirely to quantum, and the question whether the solicitor of the Corporation has asked too much does not go to the root of the question. He must be able to go into it. He is bound to make inquiries whether the lessee has executed any document which he has not registered, notwithstanding his covenant, and he must inquire into it more or less carefully according to the circumstances. In any case, it seems to me that there is a task imposed on the solicitor which he must perform if he does his

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KEKEWICH duty, and for that he must be entitled to receive reasonable remuneration. I am not saying what reasonable remuneration is, but whatever it is comes within "costs" incurred by the lessor which, according to the covenant, he is not to bear. As regards that, on the question of principle I entertain no doubt at all.

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The other question is a little more difficult, namely, whether this is covered by the scale fee. Upon that point the authorities are worth considering, and the argument that I have listened to, which was a very interesting one on either side, has assisted me. The scale fee, it must be observed, is to be paid to the vendor's or lessor's solicitor "for preparing, settling and completing conveyance and duplicate, or lease and counterpart." The purchaser's solicitor has nothing whatever to do with it; it is the vendor's or lessor's solicitor. It is not usual for the lessor to go into the title of his lessee, and, indeed, there is no occasion for him to do so except in a case like the present, where the lessee applies under a covenant for renewal, and is not the original lessee. It seems to me that "purchaser's solicitor" being absent from that heading is a guide to what is meant. It is not the vendor who investigates the title, and the lessor does not investigate the title as a rule, although he does so in certain cases. It would be, I think, going against the letter and spirit of the rule if I were to hold that because in some cases the lessor is bound to investigate the title, which as a rule he does not, and which the vendor never does, yet still the costs of investigation, when it is necessary, are included in the scale fee. But what do the cases go to? They go to shew that the scale fee covers everything in the way of business connected with the lease, and you must not draw the line too narrowly, but broadly. You must not look to see whether there was an agreement for the preparation of the lease which was antecedent to it, and which was something extra, but everything concerned with the granting of the lease is covered by the scale fee. The investigation of title, although in one sense, of course, connected with the lease, is not connected with the lease in that sense. You have not got at the question of the lease in investigating the title. The object in investigating the title is to see whether the

demandant is entitled to have the lease granted to him or not. When you have once settled that, then from that time forward the scale fee must necessarily cover everything, as far as I can see; but, until you have ascertained whether the demandant who requests the renewal is entitled to that renewal, you have not got really at the business connected with the lease, that is to say, you have not arrived at the point at which you discuss the preparation of the lease. You have to see whether or not a lease is to be granted at all. That view harmonizes with all the cases. They are useful to refer to, because they refer to the order, but they do not touch this particular point. That, I think, is a fair conclusion from them as applied to this particular case. I have not been asked to look into the question of the propriety of this particular charge or the quantum. The taxing Master, taking the view he did, properly struck the whole of that out, and unless the parties can agree it must go back, because it may be that if this charge is allowed something else ought to come off or to be reduced. It is a matter purely for the taxing Master, and does not concern me. All I say is that in this case, on principle, the Corporation of London are right and are entitled to their proper costs of investigating the title of the person who comes forward under the covenant and applies for a renewal of a lease.

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Solicitors: *Sir Homewood Crawford, City Solicitor; Wrentmore & Son.*

G. M.

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[1906 H. 2420.]

Local Government—Creation of Urban District—Subtraction of Parish from Rural District—Loss of rateable Area—Compensation—Compromise of Claims, including Claim for Loss of rateable Area—Validity—Local Government Act, 1888 (51 & 52 Vict. c. 41), ss. 57, 62—Local Government Act, 1894 (56 & 57 Vict. c. 73), ss. 54, 68—Costs—Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1.

It is no ground for setting aside a compromise that the claim, or one of the claims, made by one of the parties was not well founded in law, provided that it was put forward bona fide.

On the formation in 1900 of an urban district out of a rural district an adjustment had to be made between the two councils under the Local Government Act, 1894, of the property, income, debts, liabilities, and expenses affected by the formation of the urban district. A number of claims were put forward by the two councils against each other, including one by the rural council in respect of loss of income owing to the transfer of rateable area from the district of the rural council to that of the urban council. After considerable negotiations the two councils entered into an agreement of compromise by which the urban council covenanted to pay to the rural council a sum of 1500*l.* by thirty annual instalments of 50*l.* each, in consideration of which the rural council released the urban council from certain specified claims, including the claim for compensation for loss of income owing to the transfer of rateable area, and all other claims (if any) which the rural council had or might have against the urban council in respect of any property, income, debts, liabilities, or expenses, and the urban council also released the rural council from all claims in a similar way. At the time when the agreement was made it was considered that loss of rateable area was a matter of adjustment, but in 1904 the House of Lords decided in *Caterham Urban Council v. Godstone Rural Council*, [1904] A. C. 171, that loss of rateable area was not a matter of adjustment. In 1906 the urban council brought an action for a declaration that the agreement was ultra vires the urban council and not binding on it:—

Held, that the agreement, having been entered into bona fide by both councils, was not rendered invalid by the fact that one of the claims included in the compromise subsequently proved to be unfounded in law.

Held, also, that the case was not one which fell within s. 1 of the Public Authorities Protection Act, 1893, and, therefore, that the rural council was not entitled to solicitor and client costs.

ACTION.

Prior to 1900 the then parish of Holsworthy formed part of the Holsworthy rural district. By an order dated July 20, 1899,

and made under s. 57 of the Local Government Act, 1888, and ss. 36 and 54 of the Local Government Act, 1894, by a joint committee of the county councils of Devon and Cornwall, and duly confirmed by an order of the Local Government Board dated January 27, 1900, a portion of the then existing parish of Holsworthy in the district of the rural district council of Holsworthy (below called the rural council) was converted into the urban district of Holsworthy, and the Holsworthy Urban District Council (below called the urban council) was constituted the district council of such last-mentioned district.

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On the separation it became necessary, pursuant to the Local Government Acts, to adjust the property, income, debts, liabilities, and expenses affected by the separation, and the order provided that the adjustment should be made in the manner provided by s. 68 of the Local Government Act, 1894. The two councils appointed committees to deal with this matter. On August 4, 1900, a joint meeting of the committees of the two councils was held, at which certain matters relating to the claims on either side, and, in particular, claims in reference to repairs of roads and bridges, fencing of quarries, filling up of disused quarries and the like, were discussed, but no conclusion was arrived at, and the joint meeting was adjourned.

On October 8, 1900, two formal claims, both dated September 30, 1900, were sent by the rural council to the urban council. The first was a claim in respect of special expenses incurred prior to March 31, 1900. On this claim the rural council claimed a sum of 125*l.* 0*s.* 4½*d.* from the urban council. The second was a claim in respect of general expenses and was headed: "Claim by Rural District Council of Holsworthy in respect of General Expenses (submitted without prejudice and with reservation of full right to alter, amend, or correct the claim and to make any other or larger claim as the Holsworthy Rural District Council may be advised) on Urban District Council of Holsworthy. (For details see within)." Then followed certain figures, the details of which were given inside, and in reference to which no dispute in the present action arose; and then came this: "In addition to this sum of 42*l.* 5*s.* 9*d.*" (those were

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the figures appearing above), "the Holsworthy Rural District Council claims compensation (calculated on a balance of revenue and expenditure according to the average of the last three years) for an estimated loss of income from rates amounting to an annual sum exceeding 150*l.* per annum, but for present purposes say 150*l.* per annum, such sum to be capitalized on such a period of years as may be agreed on between the respective councils or, in the event of no such agreement, on a period of thirty years, or, as shall be fixed by arbitration." In this claim no reference was made to a claim in respect of roads and bridges.

On November 15, 1900, the clerk to the urban council wrote to the clerk to the rural council a letter in the following terms: "I am instructed to write you to say that the urban district council have considered the claims made by the rural district council for compensation and adjustment of property, debts, and liabilities affected by the creation of the urban district; and, with a view of clearing off the points in dispute as far as possible, I am directed to forward a cheque for 63*l.* 10*s.* 9*d.*, made up as follows." And then followed an account shewing certain figures as to which, as above stated, there was no dispute, and a balance of 63*l.* 10*s.* 9½*d.* due by the urban district council to the rural district council. The letter continued, "As regards the claim in respect of quarries, and for an annual loss of 150*l.*, my council are not prepared to agree with your council in admitting their liability, and I am to suggest that the matter be left to the arbitration of the Local Government Board."

On December 15, 1900, a meeting of the urban council was held, at which it was resolved that "an offer of 50*l.* per annum for a period of ten years be made (without prejudice) to the rural district council of Holsworthy in settlement of all claims and liabilities between the two councils." This offer was submitted to the committee of the rural council, who attended the meeting, and was rejected. Thereupon the urban council retired for further deliberation, the result of which was, that the offer was increased to 50*l.* per annum for twenty years instead of ten years, as at first proposed. That further offer was submitted to the committee of the rural council, and was also rejected, and

the terms of its rejection were thus recorded in the minutes of the urban council : “ This offer was then put before the rural district council committee, which was also declined by them, with an intimation that though they were prepared to considerably reduce their claim with a view to an amicable settlement being arrived at, they could not accept such a small sum.”

The matter was further considered by the urban council ; and on December 27, 1900, a resolution was passed in these terms : “ That the offer of this council be increased to 50*l.* per annum for a period of thirty years in full settlement of all claims and liabilities as existing between the two councils, and that this offer be made without prejudice.” That resolution was communicated to the rural district council, and on January 14, 1901, it was accepted by a letter from its clerk to the clerk to the urban council. The result of that was that an agreement between the two councils was sealed by them respectively on May 15, 1901. That agreement recited the order of the Local Government Board and s. 68 of the Local Government Act, 1894, and that “ whereas the rural council has made certain claims against the urban council in respect of special expenses incurred by such council in or for the exclusive benefit of the transferred area, and the urban council has made certain claims against the rural council in respect of general expenses incurred by the rural council in or for the joint benefit of the transferred area and the area comprised within the parish of Holsworthy Hamlets created by the hereinbefore-recited order and the remainder of the rural district, the particulars and amounts of which respective claims are specified and set out in the schedule hereto. And whereas it was agreed by and between the parties hereto that a balance of 63*l.* 10*s.* 9*d.* was due from the urban council to the rural council upon such last-mentioned respective claims. And whereas prior to the execution hereof the urban council has paid to the rural council the last-mentioned balance of 63*l.* 10*s.* 9*d.* and it has been agreed that each of the councils shall discharge the other and its successors from liability in respect of each and every of the said claims set out in the said schedule hereto. And whereas the rural council has made certain additional claims against the urban council in respect of repairs

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to quarry fencing in respect of expenses to be incurred in filling up disused quarries and in respect of an estimated net annual loss in income of 150*l.* owing to the transfer by the hereinbefore recited order of rateable area from the rural district to the urban district and the rural council has agreed to accept payment of the further sum of 1500*l.* by the instalments and in the manner hereinafter stipulated in full satisfaction and discharge of all such additional claims and of all other claims (if any) which the rural council has or may have against the urban council in respect of any property income debts liabilities or expenses affected by the said order." The agreement then proceeded as follows: "1. In consideration of the premises and of the payment of the sum of 63*l.* 10*s.* 9*d.* the rural council doth hereby for itself and its successors absolutely discharge and release the urban council and its successors from all liability in respect of each and every claim specified and sum mentioned in the schedule hereto; 2. The rural council in consideration of the payments hereinafter agreed to be made by the urban council doth hereby absolutely discharge and release the urban council from all liability in respect of the additional claims hereinbefore mentioned and in respect of all other claims (if any) which the rural council has or may have against the urban council in respect of any property income debts liabilities or expenses affected by the hereinbefore recited order and in respect of any property debts or liabilities transferred or retained under or by virtue of the said order or of the Local Government Act, 1894, to the intent that these presents shall be a final adjustment of all such property income debts liabilities and expenses as aforesaid. 3. The urban council doth hereby as aforesaid covenant and agree with the rural council to pay the rural council out of the district fund and general district rate of the urban district, the sum of 1500*l.* by thirty equal annual instalments of 50*l.* each, the first of such instalments to be paid on the 14th day of May, 1901, and a subsequent instalment to be paid on the 1st day of May in each year until the said thirty instalments shall have been fully paid and satisfied." Then by clause 4 the urban council covenanted for the particular time

and mode in which that payment should be made; and then clause 5 was as follows: "The urban council doth hereby for itself and its successors absolutely discharge and release the rural council and its successors from every claim of the urban council or its successors in respect of any property income debts liabilities or expenses affected by the said order and in respect of any property debts or liabilities transferred or retained under and by virtue of the said order or of the Local Government Act, 1894."

At the time the agreement was entered into both councils considered that as the result of the decisions in the Courts compensation for loss of rateable area was a valid matter of adjustment.

The first three instalments of 50*l.* were paid in due course. But in May, 1904, about the time that the fourth instalment became due, the House of Lords decided in *Caterham Urban Council v. Godstone Rural Council* (1) that loss of rateable area was not a matter for compensation which required adjustment under the Local Government Acts. In consequence of that decision the urban council at first demurred to paying the further instalment, but ultimately paid it under protest. It also paid the fifth instalment in 1905 under protest. But when the sixth instalment became due in 1906 they declined to pay it.

On August 9, 1906, the urban council commenced the present action, claiming—(1.) a declaration that the agreement of May 15, 1901, and the covenant on the part of the urban council therein contained for the payment of the 1500*l.* and interest by the urban council to the rural council, were ultra vires the urban council and were not binding on it; (2.) cancellation or rectification of the agreement; and (3.) repayment to the urban council of the two sums of 50*l.* paid thereunder under protest.

The urban council by its statement of claim alleged that the council had, subsequently to the execution of the agreement, ascertained that the claim in respect of loss of rateable value was not, and the loss was not, a matter for adjustment or compensation under the provisions of the order of the Local Government Board or of any statute, and that it had no power to pay or to enter into any obligations to pay the sum

(1) [1904] A. C. 171.

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of 1500*l.*, or any part thereof, in respect of such loss, or in satisfaction or discharge of such claim or loss, or in consideration of the discharge or release of such claim. The urban council further alleged that the agreement was void so far as it purported to bind the council to pay the sum of 1500*l.*, or, in the alternative, that it was void so far as it purported to bind the urban council to pay any sum beyond the amount which was properly claimed by the rural council in respect of its claims for quarry fencing and repairs, and that the three sums of 50*l.* each first paid under the agreement exceeded such amount.

The district of the rural council was a very large one, and contained a large mileage of roads and a great many bridges, and also a large number (ninety-two) of quarries, of which a considerable number were disused at the date of the agreement. At the trial evidence was called by the rural council to shew that the cost of putting the roads and bridges into a proper state of repair and filling up and fencing disused quarries in March, 1900, would have amounted to a large sum.

Danckwerts, K.C., and *D. M. Kerly*, for the urban council. As the law stood when the agreement of May 15, 1901, was entered into, on the creation of an urban district out of a rural district, loss of rateable area was a matter which required to be adjusted between the rural district and the new urban district under s. 62 of the Local Government Act, 1888: *In re Buckinghamshire County Council and Hertfordshire County Council* (1); *In re Rochdale Union and Haslingden Union*. (2) Those cases were, however, subsequently overruled by *Caterham Urban Council v. Godstone Rural Council*. (3) The adjustment in the present case was made under s. 68 of the Local Government Act, 1894, the provisions of which are practically identical with those of s. 62 of the Act of 1888.

The urban council, being a purely statutory body, could only apply its funds for such purposes as by statute it was empowered to apply them: *Ashbury Railway Carriage and Iron Co. v. Riche*. (4) The covenant by the urban council to apply the

(1) [1899] 1 Q. B. 515

(2) [1899] 1 Q. B. 540.

(3) [1904] A. C. 171.

(4) (1875) L. R. 7 H. L. 653.

1500*l.* for the purposes mentioned in the agreement is therefore ultra vires and void.

It is admitted that a corporation has as an incident of its existence the same power to compromise as an individual has, but the exercise of that power is subject to two essential conditions, namely, that the compromise must be in settlement of something bona fide in dispute between the parties, and that what the corporation promises to do by way of compromise must be intra vires: *Dixon v. Evans* (1); *Bath's Case* (2); *Miles v. New Zealand Alford Estate Co.* (3); *Islington Vestry v. Hornsey Urban Council* (4); *London County Council v. Attorney-General* (5); *South Yorkshire Ry. and River Dun Co. v. Great Northern Ry. Co.* (6); *Mann v. Edinburgh Northern Tramways Co.* (7)

The Court has power to set aside an agreement where, as here, it has been entered into under a common mistake of law: *Huddersfield Banking Co., Ltd. v. Henry Lister & Son, Ltd.* (8) It is not within the powers of the urban council to carry into effect the stipulation contained in the agreement for payment to the rural council of compensation for loss of rateable area.

[WARRINGTON J. Is this agreement really a compromise at all? Is it not rather an agreement for the payment of a lump sum in respect of certain claims, one of which is ultra vires?]

That is our submission. The case is put by the rural council as one of consideration. It is said that a bona fide compromise of a real claim is a good consideration whether the claim would have been successful or not, and reliance is placed on *Miles v. New Zealand Alford Estate Co.* (3) But if the compromise is illegal no amount of consideration will make it legal. A promise to do a thing which is ultra vires on the face of it does not become intra vires because it is embodied in a compromise, neither does a thing which is ultra vires become intra vires because it is done bona fide. The present agreement stands on the same footing as any other agreement, and, whether or not it was made for good consideration, it was ultra vires and is therefore void.

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(1) (1872) L. R. 5 H. L. 606.

(2) (1878) 8 Ch. D. 334.

(3) (1886) 32 Ch. D. 266.

(4) [1900] 1 Ch. 695.

(5) [1902] A. C. 165.

(6) (1853) 9 Ex. 55, 84.

(7) [1893] A. C. 69, 80.

(8) [1895] 2 Ch. 273.

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[They also referred to the Local Government Act, 1888, s. 57, sub-s. 1 (b) and (c) ; s. 59, sub-s. 4 (e) ; s. 62, sub-s. 1.]

H. Terrell, K.C., and R. M. Pattisson, for the rural council.

Upon the order and scheme coming into operation the two councils had to adjust their property and liabilities as between the two areas. That involved the consideration of a large number of matters. The urban council disputed their liability in respect of various claims made by the rural council. In these circumstances it was open to the two councils either to go to arbitration, which would have involved enormous expense, or to compromise the matters in dispute. They adopted the latter course, and ultimately the agreement of May 15, 1901, was entered into, and the question in this case is whether or not that was a valid compromise. There can be no question of rectification in a case like this; the agreement is either good or bad as a whole. Under the agreement the payment agreed to be made was not in respect of an item of claim which could not be legally claimed, but was a payment in respect of a compromise of a claim for that particular item and other claims, which is a different matter.

If the contention of the urban council be upheld by the Court, it will follow that in no case can a council enter into a compromise if there is, or the council is advised there is, anything in any of the claims compromised which is *ultra vires*. In *Huddersfield Banking Co., Ltd. v. Henry Lister & Son, Ltd.* (1) a compromise is thus defined by Kay L.J.: "A compromise takes place when there is a question of doubt and the parties agree not to try it out, but to settle it between themselves by a give-and-take arrangement." That definition covers the agreement in the present case. It is contended on behalf of the urban council that it is not a compromise if the matter in dispute is not one of liability but of quantum, but it is submitted that there is no distinction between the two cases.

A corporation has full powers of contracting except so far as such powers are expressly or impliedly limited by its constitution: *Shrewsbury and Birmingham Ry. Co. v. North Western Ry. Co.* (2) There is nothing in the constitution of either of the councils

(1) [1895] 2 Ch. 273, 285.

(2) (1857) 6 H. L. C. 113, 135.

to negative their power to contract. "A power bona fide to compromise any dispute whatever is incident to the legal existence of the persona of a body corporate or politic": per James L.J. in *Bath's Case* (1); and see *Dixon v. Evans*. (2) It is true that a compromise cannot be made which involves the doing by one of the parties of an act which is ultra vires, but a compromise may be made in order to settle a claim which is, or which if persisted in may fail because it is, ultra vires. If this were not so a corporation could never enter into a compromise. The payment agreed to be made in the present case is not in respect of an illegal claim, viz., compensation for loss of rateable area, but is a payment for a compromise of a claim for compensation for such loss and other claims. In other words, it is a payment to secure peace. The compromise of a disputed claim made bona fide is a good consideration for a promise, even although it ultimately appears that the claim was wholly unfounded: *Callisher v. Bischoffsheim*. (3)

[WARRINGTON J. You do not pay the alleged debt, but you buy the abstention of the other side from enforcing it.]

We buy peace and safety; we do not pay the debt.

[WARRINGTON J. The whole question depends on bona fides.]

There is no question of want of bona fides in the present case. Both parties desired to avoid the expense of formulating their claims. The consideration for the agreement was not the payment of the claims, but the forbearance to enforce them. It was, therefore, a bona fide compromise. In any case the urban council cannot obtain repayment of the payments already made under the agreement.

Danckwerts, K.C., in reply. The fallacy underlying the argument of the other side is that there was a compromise of liability. There was no such compromise. It was assumed throughout by both councils that there was a liability, and the only question in dispute was the amount of that liability. If there was any compromise at all it was as to the amount to be paid. A mutual accommodation is not a compromise. The agreement involved the making of a payment by the urban council for a specific

(1) 8 Ch. D. 334, 343.

(2) L. R. 5 H. L. 606, 613, 618.

(3) (1870) L. R. 5 Q. B. 449.

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WARRINGTON J. purpose which was ultra vires. The agreement is therefore void.

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April 16. WARRINGTON J. stated the facts, and continued :—At the time when the agreement in question was entered into, that is, in the early part of 1901, there had been two decisions of the Courts, one of the Queen's Bench Division and the other of the Court of Appeal, which were to the effect that loss of rateable area might properly be treated as giving rise to a claim under the adjustment required by the Local Government Acts. I infer, from the circumstances and from the documents which I have read, that both councils, or their legal advisers, were aware of these decisions, and therefore thought that the urban council's claim in this respect might in law be a valid claim. Subsequently, however, the two cases I have referred to were overruled by the House of Lords in *Caterham Urban Council v. Godstone Rural Council*. (1)

At the bar the urban council put its case in this way: It is ultra vires a statutory body, such as the urban council, to agree to make out of the rates a payment which it is not bound or entitled to make; according to the decision of the House of Lords (the one to which I have just referred), it is not bound or entitled to make any payment as compensation for loss of area; therefore, to agree to make such a payment would be ultra vires. The urban council further contends that the 1500*l.* payable under the agreement was to be paid, in part, as such compensation, and that therefore the agreement is ultra vires and not binding on it. In my opinion the fallacy of this argument rests in the allegation or assumption that the 1500*l.* was to be paid in part as compensation for loss of area. In my judgment that is not the true view of the facts disclosed by the documents, including (and I wish to emphasize this) the agreement itself. I say "by the documents" advisedly; because I do not consider that the parol evidence has added materially to the facts as disclosed by them.

In my judgment the true effect of what the two councils did

(1) [1904] A. C. 171.

was to make a compromise of their respective claims. It is no ground for setting aside a compromise that the claims or one of the claims, made by one of the parties was not well founded in law, provided that it was put forward bona fide. There is no question, in this present case, that the claim in question was put forward perfectly bona fide by the rural council. There is, further, no question that the agreement which I have read of May, 1901, was made by the two councils with perfect bona fides. That a compromise, if entered into bona fide, and if it does not involve the doing of an act by one of the parties which is itself ultra vires, may be made by and may be binding on a corporation just as on an individual is established by two cases: *Dixon v. Evans* (1) and *Bath's Case*. (2) Does the agreement in this case involve the doing of an act which is itself ultra vires? In my opinion it does not. The payment of money by one of these corporations is not ultra vires. The object and purpose with which a particular payment is made may render that payment ultra vires, and the whole question is what is the object and purpose with which that payment is made. The object and purpose for which the payment is here made is the compromise and settlement of claims made by the rural council against the urban council. I will assume for the present purpose that there was no question between them, and that they both thought that in law the claim could be sustained and that the only question was what was the amount of the claim. That, in my opinion, makes no difference. It may be a perfectly good subject of compromise to purchase the release of a claim made by one party against the other, and freedom from litigation, by making a payment which it is thought is a payment that could be legally enforced, perhaps not for that amount, but for a smaller amount, although it may afterwards turn out that the claim could not be enforced. To decide according to the contention of the urban council in this case would seem to me to be most unfortunate, because the result would be that it would never in any case be competent for such a body as the urban council to compromise a claim made against it on the footing that such a claim might be supported in law,

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(2) 8 Ch. D. 334.

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inasmuch as it might turn out afterwards that the claim could not be supported in law, and the agreement would, if the urban council's argument be correct, be held to be ultra vires. In my judgment, therefore, this action fails, and there must be judgment for the defendants with costs.

H. Terrell, K.C., for the rural council. I ask for costs as between solicitor and client under the Public Authorities Protection Act, 1893. The action is brought against the rural council in respect of an act done by it in its public capacity. The case, if not within the precise terms of s. 1 of the Act, comes within the spirit of it: *Fielding v. Morley Corporation* (1); *Cree v. St. Pancras Vestry* (2); *Waterhouse v. Keen*. (3)

WARRINGTON J. I do not think this action comes within the Act. The material part of the Act is s. 1: "Where after the commencement of this Act any action . . . is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority, the following provisions shall have effect: (a) The action . . . shall not lie . . . unless it is commenced within six months next after the act, neglect, or default complained of, or, in case of a continuance of injury or damage, within six months next after the ceasing thereof: (b) Wherever in any such action a judgment is obtained by the defendant, it shall carry costs to be taxed as between solicitor and client. . . ." Is this action an action commenced against the rural council "for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority"? The statement of claim alleges that the claim in respect of loss of rateable area was not, and the loss was not, matter for adjustment or compromise under the provisions of the order or of any statute, and, further, that

(1) [1899] 1 Ch. 1.

(2) [1899] 1 Q. B. 693.

(3) (1825) 4 B. & C. 200.

the urban council had and has no power to pay the 1500*l.* Then it is alleged that the agreement is void, so far as it purports to bind the urban council to pay the sum of 1500*l.*, and a declaration that the covenant and agreement are not binding upon the urban council is asked for. The action is founded, as it seems to me, on an act done by the urban council itself. It is said that its sealing of the agreement was improper, because it was *ultra vires*. It seems to me that the action is not brought for any act done by the rural council. The nearest case is *Cree v. St. Pancras Vestry*. (1) There the defendants had made upon the plaintiff, or his predecessors, that which was said to be an unlawful demand, and the plaintiff had complied with that demand. He then brought an action to recover the money he had paid, as money had and received to his use. The effect of the judgment of the learned judge there was that the action was brought for the act of the defendants, because it was their unlawful, or alleged unlawful, act which gave rise to it. In the present case it seems to me that there is no unlawful act, or alleged unlawful act, on the part of the rural council. Nobody suggests that it was not entitled, so far as it was concerned, to enter into the agreement. The alleged unlawful act here is the act of the urban council in entering into the agreement. It seems to me, therefore, that the present case does not come within the Act, and therefore the action will be dismissed with costs as between party and party and not as between solicitor and client.

Solicitors: *Carr, Scott, Smith & Gorringe, for W. C. R. Peterson, Holsworthy; Gibson & Weldon, for A. P. Peter, Holsworthy.*

(1) [1899] 1 Q. B. 693.

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In re DOVER COALFIELD EXTENSION, LIMITED.

[0070 of 1903.]

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April 23, 30.

Company—Winding-up—Director's Remuneration—Purchase by Company of Shares in another Company—Director of purchasing Company appointed Director of selling Company—Qualification provided by purchasing Company—Liability of Director to account for Remuneration received.

Remuneration paid by a company under powers in its articles of association to a director is not profit derived from the use of his qualification shares, but payment for work done by him under his contract with the company.

Where, therefore, qualification shares are held by a director as a trustee, he is under no obligation to account to his cestui que trust for the remuneration received by him for acting as director.

In June, 1901, the D. Company purchased 5105 shares in the K. Corporation, which were transferred into the names of the chairman and secretary of the D. Company as trustees for that company. On February 11, 1902, C., a director of the D. Company, was elected a director of the K. Corporation in order that he might look after the interests of the D. Company in the affairs of the K. Corporation. The articles of association of the K. Corporation provided that the qualification of a director should be the holding of shares in the corporation of the nominal amount of 1000*l.*, and that a director might act before acquiring his qualification. On February 28, 1902, the directors of the D. Company resolved that 1000 of the 5105 shares of the K. Corporation belonging to the company should be transferred to C. to provide his qualification as a director of the K. Corporation. The shares were accordingly transferred to C., who thereupon executed a declaration of trust of them in favour of the D. Company. C. acted as director of the K. Corporation, and continued to hold the 1000 shares which he had thus acquired until February 26, 1903, when he re-transferred them. On March 31, 1903, the company was ordered to be wound up.

On an application by the liquidator of the D. Company for payment to him of the remuneration received by C. for acting as director of the K. Corporation :—

Held, that the remuneration was received by C. for work done by him as director of the K. Corporation, and was not profit received by him from the use of the D. Company's shares in the K. Corporation, and that he was therefore under no liability to account for the remuneration to the liquidator of the D. Company.

Ex parte Beckwith, [1898] 1 Ch. 324, followed.

MISFEASANCE SUMMONS.

The Dover Coalfield Extension, Limited (below called the company), was incorporated on April 16, 1901, with a nominal capital

of 25,000*l.*, divided into 24,000 ordinary shares of 1*l.* each and 1000 deferred shares of 1*l.* each.

By article 83 of the company's articles of association it was provided that until the appointment of directors the subscribers to the memorandum of association should be deemed to be, and should have power to act as, directors.

On April 23, 1901, a resolution was passed by the subscribers to the memorandum authorizing the purchase by the company of certain shares in the Consolidated Kent Collieries Corporation, Limited (below called the corporation).

On May 1, 1901, W. J. Cousins became a director of the company, and on June 12, 1901, in pursuance of the resolution passed by the subscribers to the memorandum, the board resolved on the purchase of 5105 shares in the corporation. Those shares were accordingly purchased, and were transferred into the names of the chairman and secretary of the company as trustees for the company.

On February 11, 1902, Cousins and C. F. R. Fonrobert, who was also a director of the company, were elected directors of the corporation, the object of their election being that they might look after the interests of the company in the affairs of the corporation.

The articles of association of the corporation provided as follows:—

Article 86: "The qualification of a director . . . shall be the holding of shares in the company of the nominal amount of 1000*l.* A director may act before acquiring his qualification."

Article 87: "The board shall be paid out of the funds of the company by way of remuneration for their services the sum of 3500*l.* a year and such further sum (if any) as the company in general meeting from time to time determine, and such remuneration shall be divided among them in such proportions and manner as the board may from time to time determine."

Article 89: "The office of director shall be vacated: . . .
(d) if he cease to hold the required amount of shares or stock to qualify him for office or do not acquire the same within one month after election or appointment . . ."

On February 28, 1902, a board meeting of the company was

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held, at which Cousins and Fonrobert were the only directors present (there being at that time one other director), when the following resolution was passed: "The chairman" (Cousins) "reported that he and M. Fonrobert had been elected directors of the Consolidated Kent Collieries Corporation, and under the articles of association of that company a director was bound to obtain his qualification of 1000 shares within one month after election, and requested that 1000 of the shares of the corporation now standing in the names of the chairman and secretary, as trustees for that company, should be transferred to the chairman, and that a further 1000 of such shares should be transferred to M. Fonrobert, to provide such qualification, upon the terms that the transferees should execute a declaration of trust in favour of the company. Resolved, that such request be acceded to on the terms above mentioned, and that the transfers and declaration of trust be executed. The transfers and declaration of trust were executed accordingly." In pursuance of that resolution, a transfer of 1000 of the 5105 shares in favour of Cousins was thereupon executed, which was registered on March 14, 1902. By the declaration of trust, which was dated February 28, and therefore contemporaneous with the transfer, Cousins and Fonrobert acknowledged that they respectively held the shares in the corporation, the numbers of which were set opposite to their respective names in the schedule, as trustees for the company; and they thereby declared that they respectively would at all times thereafter "stand possessed of the said shares and of all dividends bonuses and other rights and privileges accruing or to accrue due in respect or in right of the said shares and will assign transfer pay over and dispose of the said premises and the proceeds of the same respectively in such manner as the said Dover Coalfield Extension, Limited, shall from time to time direct."

Cousins acted as a director of the corporation, and continued to hold the 1000 shares which he had thus acquired until February 26, 1903, when a number of transfers thereof, seven in all, were registered. The transfers were themselves dated at various dates from January 29 to February 17. Meanwhile, on December 30, 1902, there had been transferred to him 1200

other shares of the corporation, and that transfer was registered on the same day, so that he had on December 30, 1902, become entitled from another source to the necessary qualification as a director.

On December 29, 1902, a balance-sheet made up to November 29, 1902, was circulated amongst the shareholders, in which there appeared on the assets side the cost of 5105 ordinary shares in the corporation, followed by this note: "Of these shares 1000 are registered in the name of Mr. W. J. Cousins and 1000 in the name of Monsieur C. F. R. Fonrobert, in order to qualify them as directors of the Consolidated Kent Collieries Corporation, Limited, and thus enable them to represent the interests of this company on the board"; and in the certificate of the auditors to the balance-sheet the matter was dealt with in this way. They first mentioned the fact that the shares were held in the names of Cousins and Fonrobert, and then added: "Both these gentlemen have executed a declaration of trust of these shares and have deposited with the company in each case the share certificates and a blank transfer of shares." The balance-sheet, with the auditors' certificate, was laid before a meeting of the company. Notice was taken of the fact as to these 2000 shares which were stated in it, and some question was raised on two occasions at meetings of the company held to consider the balance-sheet and report with which it was issued, but the matter dropped.

On March 31, 1903, the company was ordered to be wound up.

A misfeasance summons was taken out by the liquidator on March 8, 1905, against Cousins and Fonrobert for a declaration that they were liable to contribute to the assets of the company the respective sums of 889*l.* 1*s.* 8*d.* and 827*l.* 17*s.* 7*d.* received by them as remuneration for acting as directors of the corporation and for payment of those sums to the liquidator.

The summons had not been served on Fonrobert, and was not therefore proceeded with against him.

Hon. E. C. Macnaghten, K.C., and *Martelli*, for the liquidator. The remuneration received by Cousins for acting as director of the corporation was profit arising from the use of the shares held

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by the company in the corporation and constituting his qualification. Being in a fiduciary relation to the company, he must therefore account for it to the liquidator: *Boston Deep Sea Fishing and Ice Co. v. Ansell*. (1) It is clear upon principle that a trustee who acts as director of a company by reason of his holding qualification shares belonging to the trust estate must account to his cestui que trust for remuneration received by him as director.

H. Terrell, K.C., and *Arnold Statham*, for creditors who had obtained leave to intervene in the liquidation, supported the same contention.

Cave, K.C., and *E. G. Palmer*, for Cousins. First, a director's remuneration is not profit at all; it is money paid for work done by the director under his contract with the company. The liquidator cannot, therefore, recover the money received by Cousins as remuneration, as it did not result from the use of the company's property. This is not a case within s. 29 or s. 30 of the Partnership Act, 1890. *Boston Deep Sea Fishing and Ice Co. v. Ansell* (1) was a case of the payment of a bonus to an agent, and therefore does not assist the liquidator.

[WARRINGTON J. Do you say that this remuneration was not a profit at all?]

Yes; the holding of the qualification shares by Cousins did not entitle him to his remuneration as director. To charge a trustee, partner, or agent with profits, the profits must be made out of the use of the trust estate, the partnership property, or the property of the principal: *Aas v. Benham* (2); *Whitney v. Smith* (3); *Keech v. Sandford* (4); *Bevan v. Webb*. (5) The remuneration of a director is not received by him in his character of a member of the company, but under his contract with the company, and in the winding up of the company he is entitled as a creditor in respect of his remuneration to compete with the other creditors of the company: *Ex parte Beckwith*. (6) The remuneration in the present case was under

(1) (1888) 39 Ch. D. 339, 355.

(2) [1891] 2 Ch. 244.

(3) (1869) L. R. 4 Ch. 513.

(4) (1726) 2 W. & T. L. C. 7th ed.

p. 693.

(5) [1905] 1 Ch. 620.

(6) [1898] 1 Ch. 324.

article 87 of the articles of the corporation payable in respect of one year's service, and, inasmuch as Cousins was elected a director on February 11, 1902, but obtained other shares sufficient to qualify him as director on December 30, 1902, the remuneration for the year was not attributable to his qualification shares provided by the company: *Salton v. New Beeston Cycle Co.* (1) [They also referred on this point to *Salisbury-Jones and Dale's Case* (2), *Hutchinson's Case* (3), and *In re Wheal Buller Consols.* (4)]

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Secondly, if Cousins is liable at all to account for moneys received by him by way of remuneration, he is entitled to a lien on them for out-of-pocket expenses and for an allowance for work done, which, it is submitted, would exactly balance his remuneration: *Brown v. De Tastet* (5); *Vyse v. Foster.* (6)

Thirdly, there has been no concealment, as the fact that Cousins was acting as director appeared in the balance-sheet. The shareholders of the company have affirmed what was done.

Hon. E. C. Macnaghten, K.C., in reply. Dealing with the substance of the case, the shares in the corporation were transferred to Cousins to enable him to become a director of the corporation and as such to represent the interests of the company on the board of the corporation. It was never intended that he should obtain remuneration for himself, but that he should protect the interests of the company on that board. The remuneration was profit made by the use of the company's property, for which he must therefore account: *Dean v. MacDowell.* (7)

It is contended that Cousins is entitled to some allowance for his services and for out-of-pocket expenses, but if he intended to claim them he ought to have applied under article 91 of the company's articles for remuneration for extra services. If he had made the application to an independent board he might have made arrangements as to them; but there was no independent board. The crucial test is the balance-sheet, in which he is represented as acting for the company.

(1) [1899] 1 Ch. 775.

(2) [1894] 3 Ch. 356.

(3) [1895] 1 Ch. 226.

(4) (1888) 38 Ch. D. 42.

(5) (1821) Jac. 284.

(6) (1872) L. R. 8 Ch. 309, 331.

(7) (1878) 8 Ch. D. 345, 354.

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WARRINGTON J. stated the facts, and continued :—The liquidator contends that he is entitled to the sums received by Cousins as director's remuneration for the period during which he held the 1000 shares transferred to him by the company, and he puts his case on this ground. He says it is clear law that every agent must account to his principal, and that every partner must account to his firm, for every benefit derived by him, without the consent of his principal or of his co-partners, from any transaction concerning the principal's business, or the business of the partnership, or from any use by him of the property of the principal, or the property of the partnership, or the namè or business connection of the partnership. He says that is a principle of equity, which nobody disputes, and he says that this case comes within that principle. Now, is that so? Does a director of one company who becomes a director of another company, and as such is required to hold a qualification, obtain his remuneration as a director by the use of the shares which qualify him as director? I do not think he does. I think it may be taken to be settled, at any rate so far as I am concerned, by *Ex parte Beckwith* (1) that the right to the director's remuneration does not arise from the possession of the qualification shares. A director is entitled to his remuneration by reason of the contract of service between him and the company for which he is acting as director. His obligation as a member of the company by reason of his shares is a distinct and separate obligation, the consequence being that in *Ex parte Beckwith* (1) the director there was treated as being entitled to receive his remuneration, not in his capacity as member, but by virtue of his independent contract, and was therefore entitled to prove for that remuneration in competition with other creditors of the company. One may test it in this way: Any benefits which Cousins obtained by the use of the shares, such as dividends, profits and so forth, he must of course account for to the company to which the shares belong, but I do not think that he obtained his director's remuneration by the use of the shares. It is perfectly true that he became a director in the interests of his company, and took these shares in order to qualify him as

(1) [1898] 1 Ch. 324.

director, but it seems to me that he obtained his remuneration, not by the use of the shares, but by acting as a director of the corporation. Moreover, I think that the liquidator is met with this difficulty, that that for which an agent or a partner is, under the doctrines of the Court of Equity, required to account is the profit that he makes by the use of the principal's property, or of the property of the partnership. Now I feel a difficulty in saying that a director's remuneration is profit; it is payment for the work which the director does on behalf of the company of which he is a director, and the ratio between the value of the work and the amount of the remuneration is settled by the contract between those two parties. It seems to me, therefore, that if I were to direct any account at all, I must direct it on the footing that Cousins was entitled to fair remuneration for the amount of work which he did, and would be entitled to be allowed against his director's remuneration such remuneration; and how would it be possible for me to ascertain what that fair remuneration is except by taking the bargain between the corporation and the director—a perfectly bona fide bargain, by which the remuneration was fixed?

It seems to me, therefore, first, that the remuneration received is not profit which is derived by the use of qualification shares—that is to say, that, assuming it to be profit, it is not derived by the use of the shares; and, secondly, that it is not profit within the principle, because Cousins has given for it that which he and the corporation have determined to be a fair quid pro quo, and it would be impossible for the Court to go behind that and say a fair remuneration would be some other sum.

On the whole, therefore, without going into the further points which have been raised by the respondent in opposition to this summons, it seems to me that the summons fails, and I must refuse it with costs.

Solicitors: *Paddison, Trevor & De La Chapelle; Pilgrim & Phillips; E. A. Fuller.*

W. I. C.

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April 18, 19,
20.*In re* ROBY.HOWLETT *v.* NEWINGTON.

[1907 R. 413.]

Will—Executor—Express Trust of Residue—Partial failure of beneficial Interest—Next of Kin—Advancements to Children by Testator—Hotchpot—Statute of Distribution, 1670 (22 & 23 Car. 2, c. 10), s. 5—Executors Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 40), s. 1.

A testator bequeathed the residue of his estate to his executors upon trust, as to 1500*l.* (part thereof), to invest and pay the income to his daughter A. for life, and after her death to divide the capital amongst her issue; and as to the remainder of the residue upon trust for the benefit of his children (including A.) and their issue. A. survived the testator and died without issue, whereby the 1500*l.* was undisposed of and passed to his next of kin, who were four of his daughters and the children of a deceased daughter. The testator during his lifetime had made advances to all his daughters in varying amounts:—

Held, that the Executors Act, 1830, did not apply, and that the 1500*l.* must be distributed amongst the next of kin without bringing the advances into hotchpot.

ADJOURNED SUMMONS.

C. J. Roby, by his will dated April 3, 1888, devised and bequeathed all the residue of his real and personal estate to his daughters A. M. Newington and E. M. Clark and one Edward Wallis, upon trust for sale and to stand possessed of the net proceeds of such sale, upon trust to pay thereout his debts and funeral and testamentary expenses, and then to invest the sum of 1500*l.* in their joint names as therein mentioned and to pay the income thereof to his daughter E. M. Clark for her life, and after her decease the testator directed his said trustees to stand possessed of the securities upon which the said sum of 1500*l.* should be invested, upon trust to divide the same equally between the issue of E. M. Clark as therein mentioned, and upon further trust to invest the residue of the said proceeds of sale as therein mentioned and to pay the income thereof equally between his four daughters A. M. Newington, E. M. Clark, A. E. Newton, and F. G. Hoffmeister, and his grandchildren E. M. Howlett and

M. M. Howlett (children of a deceased daughter) for life respectively, with gifts over, and the testator appointed his daughters A. M. Newington and E. M. Clark and Edward Wallis to be the executors of his will.

The testator died in July, 1892, and his will was proved by A. M. Newington and E. M. Clark, the other executor, Edward Wallis, having predeceased him.

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1907
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The executors realized the testator's residuary estate, and invested the 1500*l.* and paid the income of the investments representing it to E. M. Clark during her life. She died in November, 1903, without having had any issue, and by a deed dated February 16, 1905, J. Hoffmeister, the husband of F. G. Hoffmeister, was appointed a trustee of the will in conjunction with A. M. Newington and in the place of E. M. Clark.

By an order made by Swinfen Eady J. on an originating summons on February 22, 1907, it was declared that, on the true construction of the will and in the event which had happened of the death of E. M. Clark without issue, the 1500*l.* passed to the next of kin of the testator as undisposed of by his will.

The next of kin of the testator at the date of his death were the four daughters and two grandchildren named in the will. The two grandchildren were also the legal personal representatives of E. M. Clark.

The testator during his life made large advances in varying amounts to all his daughters, and the question now arose whether these advances should be brought into hotchpot in the distribution of the 1500*l.* amongst the next of kin as directed by the order of February 22, 1907, in which case (subject to the payment of certain costs) the two grandchildren would take the whole 1500*l.*, to the exclusion of the three surviving daughters, who had been advanced in much greater sums. The present summons was taken out to determine this question.

Butcher, K.C., and *Gatey*, for the plaintiffs, the two grandchildren. The 1500*l.* being undisposed of, the executors are the persons to receive it, and then under the express words of the Act of 1830 they are trustees of "any residue undisposed of"

NEVILLE J. for the next of kin. *In re Ford* (1), *Harte v. Meredith* (2), and 1907 the provisions of the Statute of Distributions as to hotchpot apply: ROBY, *Pickford v. Brown* (3) may be cited against us, but it was a *In re.* decision on the custom of London. Under the old law before the HOWLETT Act of 1830 it was settled that the rule as to hotchpot did not *v.* apply in cases of partial intestacy: *Vachell v. Jeffereys* (4); NEWINGTON. *Wheeler v. Sheer* (5); *Cowper v. Scott* (6); *Walton v. Walton* (7); but the observations of Jessel M.R. in *Stewart v. Stewart* (8) shew that the old law is altered. The comments of Lord Cairns on the Act of 1830 in *Williams v. Arkle* (9) are confined to the status of executors under that Act, and do not apply to the position of the next of kin. The Act necessarily brings in hotchpot, and that distinguishes the old cases from the later authorities: *Williams on Executors*, 10th ed. p. 1241.

Jenkins, K.C., and *Potts*, for the defendants, the three surviving daughters and the trustees and the surviving executor. This is a question of equitable trusteeship. The 1500*l.* is held by trustees, not by executors, and they hold it for the next of kin. Therefore the Act of 1830 and the later authorities relied on do not apply. That Act is only intended to apply where an executor might claim to take the undisposed-of residue beneficially qua executor, and does not apply where there is an express trust of the residue and no question of the executor taking beneficially: *Williams v. Arkle* (9); *Saltmarsh v. Barrett* (10); *Yeap Cheah Neo v. Ong Cheng Neo* (11); *In re Lacy*. (12) Further, there is no failure of the legal interest here, and *In re Ford* (1) and *Harte v. Meredith* (2) shew you must discriminate between a total intestacy and a partial intestacy as to the beneficial interest. Here there is a partial intestacy of the beneficial interest, and Theobald on Wills, 6th ed. p. 739, treats it as settled law that the Act of 1670 does not apply where there is an intestacy as to

(1) [1902] 1 Ch. 218, 222; on appeal [1902] 2 Ch. 605.

(2) (1884) 13 L. R. Ir. 341, 348.

(3) (1856) 2 K. & J. 426.

(4) (1701) Prec. Ch. 170.

(5) (1730) Mos. 301.

(6) (1731) 3 P. Wms. 119.

(7) (1807) 14 Ves. 318.

(8) (1880) 15 Ch. D. 539.

(9) (1875) L. R. 7 H. L. 606, 615, 629.

(10) (1861) 29 Beav. 474.

(11) (1875) L. R. 6 P. C. 381, 388.

(12) [1899] 2 Ch. 149.

the beneficial interest. Therefore the principle of the old cases, *NEVILLE J.* which excludes hotchpot, applies.

Butcher, K.C., in reply, cited *Urquhart v. King* (1) and *Cook v. Gregson*. (2)

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NEVILLE J. In my opinion there is an existing rule that in a case of partial intestacy as to the beneficial interest the doctrine of hotchpot does not apply, and by that rule I am bound. The question raised is whether that rule applies in cases which come within the statute of 1830, and, if so, whether the present case comes within the operation of that statute. In my opinion, having regard to the recitals in the statute of 1830, if I am right in my statement as to the existing rule when the statute was passed, it is very difficult to find any intention to change the method of distribution adopted in cases of intestacy by the Courts of Equity. But, be that as it may, I am of opinion that the bequest in this case does not come within the operation of that statute. I take the judgment of Lord Cairns in *Williams v. Arkle* (3) as shewing that that statute only applies in cases where there is a bare appointment of executors, so that the implication of law has to be resorted to in order to see whether the estate of the testator not otherwise disposed of vests in them beneficially *virtute officii*.

Now the question here is whether the 1500*l.* either did or could vest in the executor by implication of law. It seems to me that it cannot, inasmuch as it is a gift of the residue of the estate, as has been held by Swinfen Eady J., to trustees upon certain trusts. I think that a gift of part of the residue to trustees upon certain trusts excludes the implication of law by which the executor could take that particular share of residue beneficially. I hold that the distribution that must take place in consequence of the partial intestacy as to the beneficial interest must be a distribution in accordance with the recognized rule of equity, and that the property being vested in the trustees, any interest which anybody else could take could be nothing but an equitable interest, and consequently could not come

(1) (1802) 7 Ves. 225.

(2) (1856) 3 Drew. 547.

(3) L. R. 7 H. L. 606, 615, 629.

NEVILLE J. within the scope of the statute of 1830. It appears to me,
 1907 therefore, that in this case the doctrine of hotchpot must not be
 ROBY, applied in the distribution of this 1500*l.* amongst the persons
In re. entitled under the Statute of Distribution.

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Solicitors: *F. W. Henry; Ford, Lloyd, Bartlett & Co.*

H. L. F.

NEVILLE J.

In re HOLLAND.

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BRETTELL *v.* HOLLAND.

April 26.

[1907 H. 707.]

*Will—Partnership—Deceased Partner—Specific Devise of Partnership Realty—
 Solvent Partnership.*

One of the two partners in a solvent business died and by his will, after bequeathing his share in the partnership to his executors upon certain trusts, made a specific devise of his share in certain freeholds which formed part of the partnership assets. The other partnership assets were more than sufficient to pay the partnership debts:—

Held that, as between the beneficiaries claiming under the will, the specific devise of the share in partnership freeholds was valid, and that the devisees took it free from liability to contribute to the partnership debts.

Farquhar v. Hadden, (1871) L. R. 7 Ch. 1, distinguished.

ADJOURNED SUMMONS.

B. Holland and W. Holland for many years prior to the death of the former carried on business in partnership as builders and contractors at Dudley under the style of William Holland & Son. There was never any deed of partnership or any other written document regulating the affairs of the partnership. The partners were on terms of the most complete mutual confidence, and drew out of the concern approximately equal amounts as occasion required. They kept a banking account in the name of the firm.

In 1893 a piece of land in Brooke Street, Dudley, containing 737 square yards was conveyed unto the partners in fee simple as joint tenants as part of their partnership property, and in 1897 a piece of land containing 63 square yards, and adjoining the piece

of land containing 737 square yards, was conveyed to the partners NEVILLE J. in fee simple as joint tenants as part of the partnership property. 1907
 The purchase-money for both these pieces of land was drawn HOLLAND,
 out of the firm's banking account, and on this land the partners *In re.*
 built four villas with partnership moneys, and the rents of the BRETTCELL
 villas until the death of B. Holland were treated as the property *v.*
 of the firm. B. Holland died in 1901, having by his will made HOLLAND.
 in 1900 appointed the plaintiff and W. Holland, and another
 person who renounced probate, the executors and trustees
 thereof, and thereby he devised and bequeathed to them all his
 real and personal estate upon trust (*inter alia*), as to his share
 and interest in the partnership business of William Holland &
 Son, to adjust and settle all accounts relating thereto, and to
 invest the proceeds thereof and to pay the income thereof unto
 W. Holland during his life, and after his death to pay one fourth
 part of the said proceeds to R. Holland (since deceased), another
 fourth part to the defendant Henry Holland, and the remaining
 two fourth parts thereof to the defendants the four nieces of the
 testator: and as to all his share and interest in the four
 messuages in Brooke Street, Dudley, in trust to sell the same
 and to divide the proceeds equally between W. Holland and his
 niece the defendant Agnes Rowley as tenants in common.

In 1906 W. Holland died, having by his will appointed the
 plaintiff and the defendants M. Holland and J. Brooksbank
 the executors thereof. Richard Holland died in March, 1907,
 intestate.

This summons was taken out to determine whether, in
 ascertaining the share and interest of the testator B. Holland
 in the partnership business, the land comprised in the convey-
 ances of 1893 and 1897 and the four houses built thereon ought
 to be included as part of the partnership estate, or whether a
 moiety thereof or the proceeds of sale thereof was otherwise
 effectually disposed of by his said will.

Upon the death of B. Holland an account had been taken of the
 partnership assets and liabilities, from which it appeared that the
 partnership business was solvent at the death of B. Holland.
 The trade debts amounted to 111*l.* and the book debts to about
 250*l.*, and there were other assets of the partnership in addition

NEVILLE J. to the Brooke Street property. There was no contest between the estates of the two partners, and, if the specific devise of the four houses was valid, the parties beneficially entitled thereto desired to take it as realty.

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Austen-Cartmell, for the plaintiff.

Percy Wheeler, for Henry Holland and the nieces of the testator other than Agnes Rowley. Until the affairs of a partnership are wound up and adjusted neither partner has an exclusive right to any particular asset of the partnership property: *Lingen v. Simpson* (1) ; and it is the surviving partner who has the right to sell or mortgage the real and personal estate of the partnership for the purpose of winding up the business: *In re Bourne*. (2) Therefore a deceased partner cannot make an effective bequest of any specific part of the partnership property. In *Farquhar v. Hadden* (3) the partnership was insolvent, but the separate estate of each partner was solvent, and it was held that a bequest of a share in partnership leaseholds by the deceased partner was void. Here there is an express bequest of the testator's share in the partnership to his executors, with full powers to settle and arrange all the partnership affairs with the surviving partner, and it is submitted that the subsequent devise of his share in the four houses is inoperative and inconsistent with the previous bequest to the executors, who are the parties entitled to receive the share of the deceased partner when it has been ascertained. If this view is wrong, the specific devisees ought at any rate to take the four houses subject to a rateable proportion of the partnership debts.

Sargant, for Agnes Rowley and the executors of W. Holland, was not called upon.

NEVILLE J. In this case the testator, having been in partnership with his brother in a business, subsequently by his will gave all his share and interest in four messuages in Brooke Street, Dudley, on trust for sale and conversion and to divide the proceeds of sale equally between his brother and his niece the defendant

(1) (1824) 1 S. & S. 600.

(2) [1906] 2 Ch. 427.

(3) L. R. 7 Ch. 1, 6.

Agnes Rowley. It is said that that bequest fails because it turns out that the four houses and the land on which they are built are part of the partnership assets, and it is urged that the testator's share in the partnership is something that he could not dissociate from the rest of the partnership assets. That is perfectly true as between himself and his partner, but the question I have to determine is not between him and his partner, but between the beneficiaries claiming under his will, and the beneficiaries as between themselves are bound to give effect as best they can to the wishes the testator has expressed. I think the testator was entitled to treat his interest in this property as something he could separate from the rest of the partnership assets, and give it in a different direction to his general share in the business which he had previously disposed of by his will. The partnership was solvent, and the other partnership property was more than enough to clear the partnership debts. That distinguishes the present case from *Farquhar v. Hadden* (1), where the partnership was insolvent. No doubt these houses could not have been excluded from the general partnership assets and liabilities as between the partners themselves, but under the circumstances of the present case I think the testator was entitled to dispose of this particular part of the partnership assets in the way that he has done, and that the beneficiaries under his will are bound to give effect to that disposition. I also think that the specific legatees of the four houses are entitled to take them free from liability to contribute to the partnership debts.

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Solicitors: *Sharpe, Parker & Co., for Whitehouse & Co., Dudley; Ullithorne, Currey & Co.*

(1) L. R. 7 Ch. 1, 6.

PARKER J.

In re X. COMPANY, LIMITED.

1907

[00148 of 1905.]

March 5.

Company—Winding-up—Voluntary Liquidator—Officer of the Company—Duty to stamp and file Contracts with respect to Shares issued for a Consideration other than Cash—Companies Act, 1900 (63 & 64 Vict. c. 48), s. 7.

A liquidator in the voluntary winding-up of a company is an officer of the company within the meaning of s. 7 of the Companies Act, 1900, and it is, therefore, his duty to pay out of the assets of the company the stamp duty in respect of any unfiled contract constituting the title of an allottee of shares allotted for a consideration other than cash, and to file the contract when duly stamped.

Form of order on application for directions.

By an agreement dated March 17, 1902, P. agreed to sell to the X. Company, Limited (below called the company), certain freehold and leasehold property (subject to a mortgage for 35,000*l.* to a society), the benefit of certain agreements, and certain plant, machinery, and chattels. The consideration was to be the allotment to P. or his nominees of fully-paid ordinary and preference shares in the company, and the issue to the society of mortgage debentures of the company as collateral security for the 35,000*l.*

On the same March 17, 1902, the directors of the company resolved that the fully-paid shares should be allotted to P. or his nominees as indicated by him, and that certificates for the same should be filled up and the seal of the company affixed thereto, and that the certificates should be sent to a firm of solicitors with instructions to hold the same until the execution by P. of the conveyance to the company of the properties referred to in the agreement, and upon such execution to hand the certificates to P. or his nominees, whose names were inscribed therein.

The shares were issued to P. or his nominees as fully paid and they were registered as holders thereof, but he never conveyed the freehold or leasehold properties to the company.

The agreement was lodged, for adjudication of stamp duty, with the Commissioners of Inland Revenue, who asked for certain information, especially as to the price to be paid for loose chattels,

but the information was never furnished and the adjudication was never made. PARKER J.

In July, 1902, the company agreed to sell the freehold property to the C. Company, and this agreement was carried out by a conveyance to that company direct by P. and other necessary parties. This conveyance was alleged to have been properly stamped.

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In re.

On February 21, 1903, the company went into voluntary liquidation, and one G. was appointed liquidator. G. got in the assets, paid practically all the debts owing by the company, and paid a small dividend to the shareholders; then he got into difficulties, misappropriated a large proportion of the assets in his hands, and absconded.

On August 1, 1905, a new liquidator, S., was appointed by the Court, and the only outstanding asset of the company in his hands was a claim against the estate of G. in bankruptcy, estimated to result in the payment of a sum of about 683*l.*

Out of this sum the costs and expenses of the winding-up, including the remuneration of S., had to be paid.

S., on looking into the affairs of the company, found a letter, dated February 10, 1903, from the Registrar of Joint Stock Companies to the secretary of the company calling attention to the allotment of fully-paid shares for a consideration other than cash without filing the necessary contracts. Certain correspondence followed, in which the Registrar required the agreement of March 17, 1902, to be filed, but declined to file it until it had been duly stamped to the satisfaction of the Commissioners of Inland Revenue, and suggested that it was the duty of S. to have the agreement stamped in accordance with the adjudication of the Commissioners.

The estimated amount of stamp duty on the agreement (without taking into account the stamp duty on the conveyance to the C. Company) was about 520*l.* In these circumstances S., as liquidator, applied to the Court for directions as to whether he ought to pay the stamp duty on the agreement of March 17, 1902, out of the assets coming to his hands.

H. E. Wright, for the applicant. The point is not raised whether the liability to pay the duty is a Crown debt, but there

PARKER J. is a question whether the applicant is under any liability under s. 7 of the Companies Act, 1900, if he does not file the contract. That section requires that, where shares are allotted for a consideration other than cash, "a contract in writing constituting the title of the allottee to such allotment . . . duly stamped" shall be filed with the Registrar of Joint Stock Companies within one month after allotment, and further provides as follows: "If default is made in complying with the requirements of this section, every director, manager, secretary, or other officer of the company, who is knowingly a party to the default, shall be liable to a fine not exceeding 50*l.* for every day during which the default continues." It is submitted that the applicant is not an officer of the company, or, at any rate, not an officer who is liable under the section. P., as one of the directors of the company, has been served with the summons.

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[PARKER J. Can I decide the question whether the applicant is an officer so as to protect him if a common informer, or the Board of Trade, institute proceedings against him under the Summary Jurisdiction Acts?]

The liquidator desires the direction of the Court as to what he is to do, for if the stamp duty is paid out of the assets there will not be enough left to pay his remuneration and costs.

[PARKER J. Possibly up to this moment, if the duty has not been adjudicated upon, there is no neglect within the meaning of the section which would make the directors or anybody else liable to a penalty, although the moment that adjudication comes those who are the directors or officers of the company ought to see that the agreement is properly filed.]

That is what the applicant submits. It is further contended that he ought not to spend out of the assets more money in stamp duties than will remain after satisfying his own claim for costs, expenses, and remuneration.

[PARKER J. The only question is whether the applicant, as voluntary liquidator, is an officer of the company. He has all the powers of the company subject to certain statutory limitations.

George Lawrence, for the Board of Trade, referred to *Midland Counties District Bank v. Attwood*. (1)]

It cannot be argued that the applicant is an officer of the Court but if he is an officer of the company, he is not an officer "who is knowingly a party to the default" within the meaning of s. 7, for the default happened a month after allotment, and long before he was appointed liquidator of the company.

[PARKER J. But the default is continuing.]

The penalty is continuing, but there is no default on his part, for he only came into the matter for the purpose of winding up the company.

[PARKER J. The applicant is entitled as liquidator to be indemnified against all possible claims, and, if there is any risk of his being liable to pay penalties under s. 7, he is entitled to come and ask for leave to pay the stamp duty and file the agreement.]

He now applies for leave to do so.

Finlay, for the Commissioners of Inland Revenue. The agreement was presented for adjudication. Certain questions were asked, but not answered, and, as the Commissioners cannot compel answers to the questions, the matter was hung up. If, however, the document is to be filed, it must first be duly stamped. The Commissioners are the authority to decide what is the proper stamp, and when they have come to a decision, and the stamp duty has been paid, if the contract is afterwards rescinded or annulled, or is not substantially performed or carried into effect, the duty paid is returned in pursuance of s. 59, sub-s. 6, of the Stamp Act, 1891 (54 & 55 Vict. c. 39). No hardship can result from stamping the contract, and so far as the stamp is concerned the question cannot be decided here.

George Lawrence, for the Board of Trade. The amount of stamp duty must be determined by the Commissioners, but the Board of Trade requires that the agreement shall be filed, and it cannot be filed until it has been duly stamped.

Owen Thompson, for P. My client is a director of the company, but has not been "knowingly a party to the default," if any. He is, however, the shareholder having the largest interest in the assets of the company, and is anxious that at any rate some of the stamp duty should be returned under s. 59, sub-s. 6, of the Stamp Act, 1891. The applicant ought, therefore, to

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PARKER J. undertake to apply under that provision for a return of duty, on
 1907 having a proper indemnity against any costs.

X. COMPANY, *H. E. Wright* assented to this.
 LIMITED,
In re.

PARKER J. I shall give the liquidator leave—on the footing that he is an officer of the company, and might be liable to penalties under s. 7 of the Companies Act, 1900—to file the agreement of March 17, 1902, and for that purpose to pay such stamp duties as the Commissioners of Inland Revenue may adjudicate to be properly payable on that agreement, he undertaking, on a proper indemnity being given to him, to make such application as Mr. Thompson's client may think advisable for obtaining a return of such part of that duty as ought to be returned.

The order made was as follows :—

The application by summons dated, &c., of S., the liquidator of the above-named company, which . . . was adjourned to be heard in Court, &c. And upon reading, &c. And the Board of Trade and the Commissioners of Inland Revenue by their respective counsel, consenting for the purposes of the said application to be bound by this order, This Court doth order that the liquidator, the said S., be at liberty, on the footing that he is an officer of the above-named company who might be liable, within the meaning of s. 7, sub-s. 2, of the Companies Act, 1900, by reason of the above-named company not having filed with the Registrar of Joint Stock Companies the agreement dated, &c., as required by s. 7, sub-s. 1 (b), of the said Act, to file the said agreement, and for such purpose to pay such stamp duty as the Commissioners of Inland Revenue may adjudicate to be properly payable on the said agreement, the said liquidator by his counsel undertaking, on a proper indemnity being given to him by the said P., to make such application as the said P. may think advisable for obtaining a return of any stamp duty so paid if the liquidator is entitled to any such return, the Commissioners of Inland Revenue by their counsel admitting that an allowance will have to be made in respect of the ad valorem duty paid on the agreement for the sale to the C. Company, Limited, referred to in the said affidavit of, &c. And it is ordered that the costs of the applicant, the said S., and of the respondents, the Board of Trade, the Commissioners of Inland Revenue, and P., of the said application be taxed and paid out of the assets of the said company.

Solicitors for applicant : *Field, Roscoe & Co.*

Solicitors for respondents : *Solicitor to the Board of Trade ;
 Solicitor to the Inland Revenue ; Lawrence Jones & Co.*

F. E.

CHAPMAN v. SMITH.

PARKER J.

[1907 C. 460.]

1907

March 15, 18,
27.

Landlord and Tenant—Lease by Mortgagee “as Agent”—Lessee’s Covenant as to selling or removing Hay or Manure—Covenant running with Land.

R., being the mortgagee of a farm belonging to B. and the collector of the rents thereof for B., but not in possession of the land, entered into an agreement under seal, expressed to be made between R. “as agent, hereinafter called ‘the landlord’” and S., “hereinafter called ‘the tenant,’” whereby R. let the farm to S. from year to year. The agreement provided that the tenant should consume on the premises all hay and fodder, spread upon the land all manure and compost produced on the farm, not sell off any hay or fodder, and at the end of the tenancy leave all manure and compost.

R. subsequently sold and conveyed the farm to C., who brought an action to restrain S. from acting in contravention of the above-mentioned provision:—

Held—(1.) on the construction of the agreement, and having regard to the surrounding circumstances, that the demise was by the mortgagee, (2.) that, in a demise under seal by a mortgagee, the description of the person letting “as agent” was not sufficient to prevent the demise operating on the legal estate vested in him; (3.) that C., as assignee of the reversion, could enforce any covenant in the lease which ran with the reversion; and (4.) that the covenant as to hay and manure did so run.

Moor Top Farm, in the parish of Onecote, in the county of Stafford, belonged to John and Reuben Burnett as tenants in common, and in March, 1901, they let the same to Luke Smith as tenant from year to year, but without any written agreement of tenancy.

The farm had since 1873 been subject to a legal mortgage to secure 1000*l.*, which ultimately became vested in one Thomas Robinson.

Thomas Robinson collected the rent of the farm as agent for the mortgagors, and was appointed agent for that purpose by them because he was the mortgagee, but the Court did not find that he ever assumed the position of mortgagee in possession.

In 1903 Robinson contemplated the probability of the farm being sold, and thought it desirable that the sale should be

PARKER J. made subject to the tenancy agreement with Smith, and that
1907 for this purpose the agreement should be reduced into writing.
CHAPMAN Accordingly, on March 24, 1903, acting as agent for John and
v. Reuben Burnett, he gave Smith notice to determine his tenancy,
SMITH. and on October 9, 1903, he and Smith entered into an agreement
of tenancy, under seal, containing certain covenants, to enforce
which the present action was afterwards instituted.

The agreement of October 9, 1903, was expressed to be made
“between Thomas Robinson of Leek as agent, hereinafter
called ‘the landlord,’ of the one part, and Luke Smith of Moor
Top, Onecote, farmer, hereinafter called ‘the tenant,’ of the other
part,” and the landlord thereby let, and the tenant took, the farm
at the rent and under the terms and conditions thereafter
expressed. The tenancy was to be from year to year, commencing
on March 25, 1903, determinable at the end of any year by half
a year’s notice from either party, and after notice to quit the arable
land was to be given up to the landlord or incoming tenant.

Clause 9 of the agreement was as follows: “The tenant shall
consume on the premises all hay and fodder, and shall spread
upon such part of the grass land as shall most require the same all
manure and compost which may be produced or arise on the
farm, and shall not sell off any hay or fodder, and shall at the
end or determination of the tenancy leave without compensation
all manure and compost. The hay and fodder remaining on the
premises at the end or determination of the tenancy shall be
paid for by the landlord or incoming tenant at the market value
less 1*l.* per ton for marketing, but the landlord or incoming tenant
shall not be obliged to take more than one part of the preceding
harvest.” [The plaintiff at the hearing of the motion offered an
undertaking to take the whole.]

The agreement contained a proviso for re-entry by the land-
lord in case of the rent being in arrear, or non-observance of
the tenant’s covenants.

On September 8, 1906, John and Reuben Burnett, assuming
themselves to be the landlords, gave Smith notice to quit the
farm on March 25, 1907, and he advertised for February 14,
1907, an intended sale of his stock on the farm and of four
stacks of hay and a quantity of manure.

In the meantime Robinson, as mortgagee, sold the farm to John William Chapman, and conveyed it to him by an indenture dated September 29, 1906.

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On February 9, 1907, Chapman commenced an action against Smith for a declaration that the defendant was bound under the terms of his agreement of tenancy to consume on the farm "of which he is tenant to the plaintiff" all hay and fodder, and was not at liberty to sell off any hay or fodder, and was bound to spread upon such of the grass land as should most require the same all manure and compost which had been produced on or might arise on the farm, and was bound at the end or determination of his tenancy to leave all manure and compost on the farm without compensation. He also claimed an injunction, and shortly afterwards moved for an interlocutory injunction to restrain the defendant from selling off any hay or fodder, the produce of the farm, and from removing from the farm any manure or compost produced thereon.

Whinney, for the plaintiff. If the agreement was a demise by Robinson himself, the defendant now holds the farm, as tenant, on the terms set out in the agreement. If, on the other hand, the introduction of the words "as agent" created a tenancy between the mortgagors and the defendant, then Robinson, as mortgagee, has adopted the mortgagor's agreement so as to establish the relation of landlord and tenant between himself and the defendant in the terms of the agreement: *Smith v. Eggington*. (1) An agreement so adopted by a mortgagee will be ordered to be specifically performed: per Lord Selborne L.C. in *Corbett v. Plowden*. (2)

By s. 2 of the Tenants' Compensation Act, 1890 (53 & 54 Vict. c. 57): "Where a person occupies land under a contract of tenancy with the mortgagor . . . which is not binding on the mortgagee of such land, then . . . the occupier shall, as against the mortgagee who takes possession, be entitled to any compensation which is, or would but for the mortgagee taking possession be due to the occupier from the mortgagor as respects crops, improvements, tillages, or other matter connected with the

(1) (1874) L. R. 9 C. P. 145.

(2) (1884) 25 Ch. D. 678, 681.

PARKER J. land." It is therefore in the interest of a mortgagee not to
 1907 disturb a tenancy existing between a mortgagor and some other
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Stipulations pass to successors, even in the case of yearly tenancies, when rent has been paid either by the successor of the tenant to the landlord, or by the tenant to the landlord, and received without objection: *Buckworth v. Simpson* (1); *Cornish v. Stubbs* (2); *Manchester Brewery Co. v. Coombs*. (3) The circumstances warrant a finding that the mortgagee intended to deal with the defendant as tenant under the agreement: *Roulston v. Caldwell*. (4) From the fact of rent having been paid it must be inferred either that the payment was made under the agreement with Robinson, or that a new agreement of tenancy on the same terms was entered into. If, by using the words "as agent," Robinson contracted on behalf of the mortgagors, he was nevertheless the person to receive the rent: *Tanner v. Christian*. (5) And the plaintiff, as the assign of Robinson, is entitled to enforce the agreement. If an agent makes himself a contracting party, he will be liable on the deed, although he may profess to contract on behalf of a third party: *Evans on Principal and Agent*, 2nd ed. p. 207. [He also referred to *Gladman v. Plumer*. (6)]

P. F. Stokes, for the defendant. The agreement only created an estate by estoppel between the tenant and the mortgagors. The defendant regarded the mortgagors as the landlords, and if that was their position the mortgagee could not make the defendant his tenant by giving him notice of his mortgage and requiring payment of rent to himself: *Evans v. Elliot*. (7) The position of Robinson was like that of a broker, who by entering into a contract on behalf of another person does not himself become a contracting party in the absence of custom or usage of trade: *Fairlie v. Fenton* (8); *Fleet v. Murton* (9); *Hutchinson v. Tatham*. (10) The rule is the same when the principal is not named, if it appears that the

(1) (1835) 1 C. M. & R. 834.

(2) (1870) L. R. 5 C. P. 334, 338.

(3) [1901] 2 Ch. 608, 615.

(4) [1895] 2 I. R. 136.

(5) (1855) 4 E. & B. 591.

(6) (1845) 15 L. J. (Q.B.) 79.

(7) (1838) 9 Ad. & E. 342.

(8) (1870) L. R. 5 Ex. 169.

(9) (1871) L. R. 7 Q. B. 126.

(10) (1873) L. R. 8 C. P. 482.

broker is contracting for a principal: *Haigh v. Stuart*. (1) That PARKER J.
 case, *Gadd v. Houghton* (2), and *Fleet v. Murton* (3) are all incon- 1907
 sistent with *Paice v. Walker* (4), in which it was held that a CHAPMAN
 person signing a contract in his own name was not exempted v.
 from liability by merely describing himself as agent for a named SMITH.
 principal without words expressly or by necessary implication
 shewing that he only signed as agent. To render the agent
 liable an intention to that effect must, in the absence of usage,
 be shewn by the contract: *Southwell v. Bowditch* (5); *Hutcheson*
& Co. v. Eaton & Son. (6) “The mere fact that the tenant is
 paying rent to the mortgagee after notice is no evidence that the
 tenancy is to be on the same terms as those on which the tenant
 held under the mortgagor”: per Joyce J. in *Keith v. R. Gancia*
& Co. (7) Nor is the mere fact of a tenant remaining in posses-
 sion after notice to pay rent to a mortgagee evidence of an
 agreement to become his tenant: *Towerson v. Jackson* (8); 1
 Smith’s L.C. 10th ed. p. 506. The agreement as to the hay
 does not relate to the land.

Whinney, in reply. In the cases which have been cited as to
 brokers’ contracts the agreements were not under seal. It is
 immaterial whether the agreement as to the hay ran with or
 related to the land: *Clegg v. Hands*. (9) [He referred also to
 s. 10 of the Conveyancing and Law of Property Act, 1881
 (44 & 45 Vict. c. 41).

PARKER J. referred to *Lybbe v. Hart*. (10)]

Cur. adv. vult.

March 27. PARKER J. (after stating the facts). The first
 question which arises is, Who upon the true construction
 of this agreement is the landlord? But for the words “as
 agent” in the expression “Thomas Robinson of Leek, as agent,
 hereinafter called ‘the landlord,’ ” there could be no doubt that
 Thomas Robinson was the landlord, and that the plaintiff—to
 whom the farm has been sold, and conveyed by indenture dated

(1) [1890] W. N. 213.

(6) (1884) 13 Q. B. D. 861.

(2) (1876) 1 Ex. D. 357.

(7) [1904] 1 Ch. 774, 783.

(3) L. R. 7 Q. B. 126.

(8) [1891] 2 Q. B. 484.

(4) (1870) L. R. 5 Ex. 173.

(9) (1890) 44 Ch. D. 503.

(5) (1876) 1 C. P. D. 374.

(10) (1885) 29 Ch. D. 8.

PARKER J. September 29, 1906—could enforce the covenants contained in the agreement, so far as the benefit of them runs with the reversion. But it is said that the introduction of the words "as agent" shews that Robinson was acting only as agent for the mortgagors, who are consequently the real landlords, and that the agreement therefore does not operate as a legal demise at all, but creates an estate by estoppel between the tenant and the mortgagors only, and that the plaintiff, deriving title from the mortgagee, has not, as against the tenant, any privity of estate or contract by virtue of which he can enforce the covenants contained in the agreement.

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I think that the question who was the landlord is a question of construction, in deciding which I may look at the surrounding circumstances, but cannot admit any direct evidence of intention. Robinson, as mortgagee under the mortgage dated in 1878, was the only person who could create a legal demise: the mortgagors could at most create a demise by estoppel. On the other hand, a mere consent by the mortgagors might be sufficient to preclude them from asserting upon redemption any equity to avoid a tenancy created by the mortgagee. The actual person referred to as landlord in the agreement is, I think, undoubtedly Thomas Robinson, but it is urged that a demise by him "as agent" shews that the instrument of demise was not intended to affect his own estate. If, however, I can read those words as meaning on behalf of all parties interested, that is, Thomas Robinson himself and his mortgagors, we get a demise which would not only be good at law, but—on the hypothesis that the demise was made with the consent of the mortgagors—would bind the mortgagors after redemption; and in my judgment it is not unlikely that the words "as agent" were introduced with some such object. It is true that the Burnetts never gave Robinson any power under seal, and therefore he may have had no power to seal any document on their behalf, but I do not think a consent under seal is necessary to preclude a mortgagor from electing upon redemption to avoid a legal demise created by his mortgagee. He may so preclude himself in other ways, and it is part of the defendant's case that the Burnetts assented to what had been done, and accepted rent under the agreement.

But whatever meaning the parties attached to the words "as agent," I do not think that in a demise under seal they are sufficient to prevent the demise operating on the legal estate vested in Robinson. If Robinson, or the plaintiff, or his assignee were now contending that as against them the agreement was inoperative, could they successfully maintain that, according to the true construction of the agreement, the demise was not the demise of Robinson? I think not, and I am of opinion that the defendant's contention to that effect similarly fails.

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My attention was called to a great many authorities bearing on the question whether a person expressed to contract as agent, either for a named or an unnamed principal, can himself be personally liable on the contract. Having come to the conclusion that this question is in each case a question of construction having regard to the surrounding circumstances, I need not consider these authorities in detail. I may, however, refer to the case of *Tanner v. Christian* (1), which in some respects is analogous to the present case.

If the agreement operates as a demise of the farm by Robinson to the defendant, it follows that the plaintiff, as assignee of the reversion, can enforce any covenants contained therein the benefit of which runs with the reversion. In my judgment the benefit of the covenants in question does run with the reversion. The covenants concern the use of the demised premises in a manner which the lessor chooses to assume will be beneficial to him: per Rigby L.J. in *White v. Southend Hotel Co.* (2) They therefore touch or concern the land: see the observations of Cotton and Lopes L.JJ. in *Clegg v. Hands.* (3)

This being so, the plaintiff succeeds on the grounds I have mentioned, and it becomes unnecessary for me to express any opinion upon the question whether he could have succeeded, having regard to the evidence, if I had held that the agreement must be looked upon simply as an agreement between the mortgagors and the tenant which the mortgagee and his assigns could have repudiated altogether.

(1) 4 E. & B. 591.

(2) [1897] 1 Ch. 767, 774.

(3) 44 Ch. D. 503, 512.

PARKER J. The result is that, the parties having agreed to treat the motion as the trial, there must be an injunction as asked, the plaintiff's undertaking to purchase all the hay and fodder being incorporated in the order; and the defendant must pay the costs of the action.

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Solicitors for plaintiff: *Swann, Bradley & Co., for Challinors & Shaw, Leek.*

Solicitors for defendant: *Chester & Co., for E. A. Paine, Hanley.*

F. E.

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[1906 W. 376.]

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 April 24, 25;
 May 4.

Mortgage—Priority—Legal Estate—Subsequent equitable Interest—Postponement—Fraud—Negligence—Omission to get Possession of Title Deeds—Trustee's Negligence—Position of Cestui que Trust.

By his marriage settlement W. conveyed real estate to trustees to be held upon trusts under which he took a life interest determinable on alienation, and, subject to that and to a discretionary trust in the event of his interest determining in his lifetime, his wife was entitled for her life. The same solicitors acted for all parties. They had in their possession a bundle of deeds purporting to be the title deeds of the property, and were not aware that W. still retained the deed by which the property was conveyed to him. Some years after the marriage W. mortgaged the property and handed over the conveyance to the mortgagee, who afterwards sold the property. Neither the mortgagee nor the purchaser from him had any notice of the settlement. W. absconded, and his wife brought an action against the purchaser, the trustees, and her husband for a declaration that W.'s life interest had determined and that the purchaser's interest in the property was subject to her interest under the settlement:—

Held, that all the parties except W. had acted honestly, but that the trustees had been guilty of negligence, and their legal estate must be postponed to the subsequent equitable interest of the purchaser from the mortgagee; and that the plaintiff was in no better position than her trustees.

Lloyd's Banking Co. v. Jones, (1885) 29 Ch. D. 221, followed.

THE following statement of facts is taken from the judgment of Parker J.:—

Shortly before his marriage, which took place in the month of

September, 1896, the defendant George Church Walker purchased the messuage or tenement and premises known as No. 53, Forest Drive, West Leytonstone, in Essex. The firm of Edell & Gordon acted as his solicitors in the purchase, Mr. Patrick having charge of the matter on the firm's behalf. Mr. Patrick is dead, but it appears from an entry in his handwriting in the firm's books, and is not disputed, that upon the completion of the purchase he sent the purchase deed, which was dated May 8, 1896, to the purchaser, George Church Walker.

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In September, 1896, George Church Walker was engaged to be married to the plaintiff, and prior to the marriage he executed two settlements both dated September 4, 1896. By the first of these settlements he conveyed the purchased property to the defendants Thomas James Walker and Percy Cook, upon trust for sale, and to hold the proceeds upon the trusts declared by the second settlement, and by the second settlement the proceeds of sale were to be held upon trusts under which George Church Walker took a life interest determinable upon alienation, and, subject to this life interest and to a discretionary trust conferred on the trustees in the event of it determining in his lifetime, the plaintiff was entitled for life: after the plaintiff's death, and in the event of there being no children of the marriage, the proceeds of sale were to belong to the defendant George Church Walker.

In the preparation of these settlements Messrs. Edell & Gordon acted for all parties, Mr. John Frederick Edell having charge of the matter on behalf of his firm. Mr. Edell omitted to obtain the conveyance of May 8, 1896, from Walker, thus enabling the latter to commit the fraud which he subsequently did commit. The reason Mr. Edell omitted to obtain this deed was that he believed his firm to be already in possession of it, and was ignorant of its having been sent by Mr. Patrick to Walker. It was no doubt great negligence on the part of Mr. Edell not to verify this belief, but I cannot find that he acted otherwise than perfectly honestly in the matter.

George Church Walker was by the possession of the deed enabled to mortgage, and did mortgage, the property on February 13, 1903, to Henry William Search, and on July 1,

PARKER J. 1903, he obtained a further advance from Search on the same property.

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The securities thus created were on August 18, 1903, transferred to William Goodwin Barnes, and on June 20, 1904, Barnes, under the power of sale contained in the mortgage, sold and conveyed the property to the defendant Linom. The deed of May 8, 1896, was handed by Walker to his mortgagees, and by them to their transferee, through whom on the sale in 1904 it came into the possession of the last-named defendant. Neither the mortgagee nor anyone claiming through him had at any material time any notice of the settlements.

After the marriage Walker and the plaintiff for some little time lived together on the property; then Walker let it and received the rents. He was tenant for life, and the property could not be sold without his consent, and the trustees appear to have allowed him to enter into occupation and receive the rents. When the defendant purchased the property from the transferee of the mortgages created by Walker he entered, and has since remained in possession of the property or in receipt of the rents and profits thereof. In March, 1903, Walker told the plaintiff that he had raised money on the property. She asked him how he could do so, seeing that the property was settled, and was told he was tenant for life and could do as he liked. She was satisfied with this, and took no steps in the matter. She heard nothing more until July 20, 1904, when she appears to have been informed that the house was sold, and on July 27 she consulted Mr. J. F. Edell. The latter, finding the report as to the sale to be correct, had the parcel of documents relating to the trusts examined, and found for the first time that it did not contain the deed of May 8, 1896.

The trustees upon the occasion of the settlement being executed left Mr. Edell to do all he considered proper and necessary, and did not themselves make any inquiry as to the title deeds of the property or otherwise, nor have they ever taken any steps to give effect to the trusts affecting the property.

In March, 1904, Mr. Percy Cook, having seen Walker's name in certain police-court proceedings, became uneasy, and called on Mr. Edell to inquire whether the deeds were all right. He

was told they were, and Mr. Edell shewed him the bundle of deeds. Mr. Edell, however, did not then examine the contents of the bundle or ascertain that the deed of May, 1896, was missing. Walker disappeared, and his wife brought this action against the purchaser, the trustees, and her husband for a declaration that Walker's life interest had determined, and that the purchaser's interest in the property was subject to her interest under the settlement.

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Romer, K.C., and *MacSwinney*, for Mrs. Walker. The plaintiff is in a better position than her trustees; her equitable interest is prior in date to that of the defendant, and she is entitled to the relief sought by the claim. The trustees have the legal estate, and she is not affected by their omission to obtain possession of the conveyance to Walker. It is not negligence in a purchaser to take his purchase in the name of a sole trustee, to leave the indicia of title in his hands, and to exercise no supervision over his conduct; the cestui que trust is not affected by any use which the trustee makes of his position, nor by the fact that a subsequent incumbrancer has obtained the legal estate: *Cory v. Eyre* (1); *Ashburner on Mortgages*, p. 428. The cestui que trust is entitled to assume that the trustee is doing his duty, and he will not be postponed to a subsequent incumbrancer if he had no ground for supposing that there was any want of good faith on the part of the trustee: *Carritt v. Real and Personal Advance Co.* (2); *Taylor v. London and County Banking Co.* (3) In the absence of negligence or fraud on the part of the cestui que trust the maxim "Qui prior est tempore potior est jure" is the principle acted on in all these cases: *Bradley v. Riches* (4); *In re Richards* (5); *Shropshire Union Railways and Canal Co. v. Reg.* (6); *Evans v. Bicknell.* (7)

On the other hand, *Pearson J.*, in *Lloyd's Banking Co. v. Jones* (8), said that he would be introducing a most fatal doctrine if he were to say that "when the legal estate in property is

(1) (1863) 1 D. J. & S. 149.

(2) (1889) 42 Ch. D. 263.

(3) [1901] 2 Ch. 231, 261.

(4) (1878) 9 Ch. D. 189

(5) (1890) 45 Ch. D. 589.

(6) (1875) L. R. 7 H. L. 496.

(7) (1801) 6 Ves. 174.

(8) 29 Ch. D. 221, 228.

PARKER J. vested in a trustee under a marriage settlement, the simple fact that his cestuis que trustent are ignorant of what he is doing gives them a prior equity over any person who has dealings with him, and who is equally ignorant of the existence of the settlement and of the rights of the cestuis que trustent." That proposition is exactly contrary to the authorities which we have cited, and it cannot be supported. The learned judge's statement (1) that "where there are equities which are otherwise equal, the possession of the deeds gives priority to the person who has got them" is also opposed to authority. It was disapproved of in *In re Castell & Brown, Ltd.* (2)

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[PARKER J. In that case the trustee had the legal estate, but he had not got the deeds, and the rights of the cestuis que trust were subject to the possibility of his not getting them. In all the other cases the trustee had had the deeds.]

In point of law that is no distinction. The question is whether our equitable interest can be defeated by the negligence of the trustees. It is not the duty of a lady who takes a life interest under a settlement to make inquiries about the title deeds of the property.

Secondly, we submit that the trustees themselves have not done anything which can postpone them to the defendant. A legal mortgagee will not be postponed to a subsequent equitable mortgagee unless the former is proved to have been guilty of fraud: *Northern Counties of England Fire Insurance Co. v. Whipp.* (3) On the facts we submit that neither the trustees nor Mrs. Walker have been guilty of negligence.

Buckmaster, K.C., and *J. G. Wood*, for the purchaser. The principles laid down by the authorities are clear. If a man is a trustee for A., and afterwards becomes a trustee of the same property for B., A. has the priority, because he is first in point of time. That priority is not affected by the fact that owing to the position of the trustee no inquiries are made by A.; and A., by omitting to inquire, is not guilty of such negligence as will postpone him to B., although if he had inquired he might have prevented the fraud. There the question is what has been done

(1) 29 Ch. D. 229.

(2) [1898] 1 Ch. 315.

(3) (1884) 26 Ch. D. 482.

by the cestui que trust. But here the first question is whether the trustees were guilty of negligence, and we contend that they were so, inasmuch as they did not take steps to get possession of the conveyance. In all the cases which have been cited the title which has been attacked has been that of the cestui que trust; but in this case it was the trustees who had no title. They did not do the one thing necessary to perfect their title; and their title has never been complete. There is a great difference between merely making no inquiries and not getting possession of the deeds at all. Therefore, if they were ordinary grantees, not trustees, their claim would be postponed to ours: *Clarke v. Palmer*. (1)

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It has been contended that the legal estate will only be postponed to a subsequent equitable estate in cases where fraud is established; and *Northern Counties of England Fire Insurance Co. v. Whipp* (2) was cited as an authority for that proposition. But there are many authorities to the contrary. In *Clarke v. Palmer* (1) there was no fraud. Fry L.J. cannot have meant fraud in the sense of dishonesty. In *Oliver v. Hinton* (3) Lindley M.R. said that "to deprive a purchaser for value without notice of a prior incumbrance of the protection of the legal estate it is not, in my opinion, essential that he should have been guilty of fraud; it is sufficient that he has been guilty of such gross negligence as would render it unjust to deprive the prior incumbrancer of his priority." In this case the equities are not equal. There was negligence on the part of the trustees, for they made no inquiries about the conveyance. The employment of a solicitor did not relieve them from the duty of getting possession of the title deeds. It may be that beneficiaries may sometimes have a better right than their trustees, but it is not so in all cases. They cannot have a better title than that which has been conveyed to their trustees. The decision in *Lloyd's Banking Co. v. Jones* (4) is right, and it has never been doubted or overruled. The simple fact that they are beneficiaries and have no knowledge of the facts does not help them. The observation in *In re Castell & Brown, Ltd.* (5) is only a dictum. Mrs. Walker is not

(1) (1882) 21 Ch. D. 124.

(3) [1899] 2 Ch. 264, 274.

(2) 26 Ch. D. 482.

(4) 29 Ch. D. 221.

(5) [1898] 1 Ch. 315.

PARKER J. better off in equity than if she had acted as the trustees did:
 1907 *In re Ffrench's Estate* (1); *Bank of Ireland v. Cogry Flax*
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 v. guilty of negligence.
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Gatey, for the trustees, took no part in the argument.

Romer, K.C., in reply. There has not been sufficient negligence on the part of the solicitors to postpone the trustees. If the trustees had had the beneficial interest it is clear that they would not have been postponed. They were not guilty of any fraud, and fraud is essential: *Northern Counties of England Fire Insurance Co. v. Whipp*. (3) They have not wilfully abstained from getting hold of the conveyance, nor done anything which brings them within *Oliver v. Hinton*. (4) The statement in *Berwick & Co. v. Price* (5) that omission to require delivery of title deeds makes it unjust to prefer the purchaser to a previous mortgagee who has the deeds does not apply as against a legal estate: *Taylor v. Russell*. (6) There was no deliberate intention to avoid knowledge of the fact that Walker retained the conveyance. As equitable tenant for life he was entitled to retain possession of the conveyance as against the trustees. Our title is complete, and the absence of the deed is of no consequence.

Cur. adv. vult.

May 4. PARKER J. stated the facts, and continued:—Under these circumstances the question arises whether the plaintiff or the defendant ought to suffer for the fraud committed by George Church Walker. To determine this it will be convenient to consider separately the position of the plaintiff and her trustees. I will deal first with the position of the trustees.

Now it cannot be disputed that the settlement constituted a conveyance for value, and that the trustees have the legal estate. — The circumstances under which a mortgagee or purchaser with the legal estate is, by reason of some conduct on his part in relation to the title deeds, postponed to some person having only an equitable interest is discussed fully in the case of *Northern*

(1) (1887) 21 L. R. Ir. 283, 319.

(2) [1900] 1 I. R. 219, 236.

(3) 26 Ch. D. 482.

(4) [1899] 2 Ch. 264.

(5) [1905] 1 Ch. 632.

(6) [1892] A. C. 244.

Counties of England Fire Insurance Co. v. Whipp (1), in which Fry L.J. delivered the considered judgment of the Court of Appeal. The Lord Justice states the question for decision by referring to the rival contentions of the parties. "It has been contended," he says, "on the part of the plaintiffs that nothing short of fraud will justify the Court in postponing the legal estate. It has been contended by the defendant that gross negligence is enough." He then divides the cases which may assist in answering the question for decision into two categories, namely, (1.) those which relate to the conduct of the holder of, the legal estate in not getting possession of the deeds, and (2.) those which relate to the conduct of such holder in dealing, with the deeds after he has got them. In the former category the question may be between the holders of the legal estate and either a prior or a subsequent incumbrancer or purchaser. In the latter case it can only be between the holder of the legal estate and a subsequent incumbrancer or purchaser. The two classes, he says, will not be found to differ in the principles by which they are to be governed, but they do differ much in the kind of fraud which is to be most naturally looked for. In the former case you would naturally look for some such "dolus malus" as indicated by Lord Hardwicke in *Le Neve v. Le Neve*. (2) In the latter case you look for some actual concurrence in the fraudulent design of another. The learned Lord Justice next discusses at length the judgment of Lord Eldon in *Evans v. Bicknell* (3), and comes to the conclusion that the language of Lord Eldon in that case, though loose and difficult to construe, points to fraud as the necessary conclusion before the Court can deprive the holder of the legal estate of the rights derived therefrom. "This fraud," he continues (4), "no doubt, may be arrived at either by direct evidence or by evidence circumstantial and indirect, and it does not cease to be fraud, because the particular object in contemplation of the parties may have been a fraud in some respects different from the fraud actually accomplished; or because the person intended to have been defrauded may be different from the person actually defrauded;

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(1) 26 Ch. D. 482, 486. (3) 6 Ves. 174.
(2) (1747) Amb. 436, 445. (4) 26 Ch. D. 490.

PARKER J. or because the original fraudulent intention had no particular person in view." That fraud, and fraud alone, is the ground for postponing the legal estate is, he says, confirmed by the judgments of Lord Hardwicke in *Le Neve v. Le Neve* (1), Sir William Grant in *Barnett v. Weston* (2), and James L.J. in *Ratcliffe v. Barnard*. (3) He then subdivides the cases relating to the conduct of the holder of the legal estate in not getting possession of the deeds into various classes, the first class being where no inquiry has been made for the deeds and the holder of the legal estate has therefore been postponed either to a prior equitable estate, as in *Worthington v. Morgan* (4), or, as in *Clark v. Palmer* (5), to a subsequent equitable owner who has obtained the deeds. In these cases he says the Courts have considered the conduct of the holder of the legal estate in making no inquiry to be evidence of the fraudulent intent to escape notice of a prior equity, and, in the latter case, that a subsequent mortgagee who has in fact been misled by the mortgagor taking advantage of the conduct of the legal mortgagee could, as against him, take advantage of the fraudulent intent. I need not consider the other classes.

The Lord Justice next subdivides and considers the cases relating to the conduct of the holder of the legal estate in dealing with the deeds after he has got them. The case with which he was actually dealing was a case under this category.

The conclusion he ultimately arrives at is that in order to postpone a prior legal to a subsequent equitable estate there must be fraud as apart from negligence, and this conclusion is stated in language wide enough to cover cases of postponement based upon the conduct of the holder of the legal estate in not getting possession of the title deeds as well as cases of postponement based upon the conduct of such holder in dealing with the title deeds after he has got them. It would seem at first sight that the Lord Justice uses the word "fraud" throughout this judgment as connoting a dishonest intent, notwithstanding that in the case of fraud to be gathered from conduct in relation to

(1) Amb. 436, 445.

(3) (1871) L. R. 6 Ch. 652.

(2) (1806) 12 Ves. 130.

(4) (1849) 16 Sim. 547.

(5) 21 Ch. D. 124.

not getting in the title deeds he refers to such cases as *Le Neve* v. *Le Neve* (1) and *Ratcliffe v. Barnard*. (2)

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Now, as I have already said, I cannot under the circumstances of this case find that anyone concerned in the 1896 settlement, with the exception of George Church Walker, acted otherwise than honestly, and, if I treat Fry L.J.'s judgment as meaning that in no case can a prior legal estate be postponed to a subsequent equitable estate without the existence of fraud in its ordinary common law sense as necessarily connoting a dishonest intention, I must hold that the trustees are not postponed. There are, however, subsequent cases which suggest that at any rate in cases of postponement, based on no inquiry having been made for the deeds, fraud is not necessary. It is, for example, clear from the case of *Oliver v. Hinton* (3) that a purchaser obtaining the legal estate, but making no inquiry for the title deeds, or making inquiry and failing to take reasonable means to verify the truth of the excuse made for not producing them or handing them over, is, although perfectly honest, guilty of such negligence as to make it inequitable for him to rely on his legal estate so as to deprive a prior incumbrancer of his priority. In this case Lindley M.R. disapproves of the passage in the judgment of James L.J. in *Ratcliffe v. Barnard* (2), quoted by Fry L.J. in *Northern Counties of England Fire Insurance Co. v. Whipp* (4), and distinctly says that to deprive a purchaser for value without notice of a prior equitable incumbrance of the benefit of the legal estate it is not essential that he should have been guilty of fraud. And Sir F. H. Jeune, referring also to the judgment of James L.J. in *Ratcliffe v. Barnard* (2), comes to the conclusion that the word "fraud," as there used, did not mean such conduct as would justify a jury or judge in finding that there had been actual fraud, but such conduct as would justify the Court of Chancery in concluding that there had been fraud in some artificial sense. Similarly in *Berwick & Co. v. Price* (5) Joyce J. says: "The omission by a purchaser to investigate the title or to require

(1) Amb. 436.

(3) [1899] 2 Ch. 264.

(2) L. R. 6 Ch. 652.

(4) 26 Ch. D. 482.

(5) [1905] 1 Ch. 632, 640.

PARKER J. delivery or production of the title-deeds is not to my mind either fraudulent or culpable, nor does it, since the judgment of 1907 Lindley M.R. in *Oliver v. Hinton* (1), seem necessary to WALKER characterize it by any such epithet; but the consequence of such v. LINOM. omission or wilful ignorance is that it is held to be unjust to prefer the purchaser to the previous mortgagee who has the deeds although such mortgage be equitable and the purchaser have the legal estate."

In both the cases last referred to the question was between a prior equitable and a subsequent legal estate, and I think the later case was actually decided on constructive or imputed notice. But the Master of the Rolls expressly refused to decide *Oliver v. Hinton* (1) on any such ground. The question, however, arises whether the principle laid down in *Oliver v. Hinton* (1) is equally applicable between the holder of the legal estate who has omitted to make inquiry for the title deeds and a subsequent equitable estate the creation of which has been rendered possible by such omission. In my opinion any conduct on the part of the holder of the legal estate in relation to the deeds which would make it inequitable for him to rely on his legal estate against a prior equitable estate of which he had no notice ought also to be sufficient to postpone him to a subsequent equitable estate the creation of which has only been rendered possible by the possession of deeds which but for such conduct would have passed into the possession of the owner of the legal estate. This must, I think, have been the opinion of Fry L.J. in *Northern Counties of England Fire Insurance Co. v. Whipp* (2); for he explains both *Worthington v. Morgan* (3) and *Clarke v. Palmer* (4) as based upon the same sort of fraud. I do not think, therefore, that there is anything in the authorities to preclude me from holding, and I accordingly hold, that the trustees, although they have the legal estate, are postponed to the defendant.

Passing now to the position of the plaintiff herself, her interest is prior in time to the defendant's interest, and both are equitable. The usual rule is, the equities in other respects being equal, that which is prior in point of time prevails. The question, therefore,

(1) [1899] 2 Ch. 264.

(3) 16 Sim. 547.

(2) 26 Ch. D. 482.

(4) 21 Ch. D. 124.

is whether the equities are in other respects equal. It is argued PARKER J.
 that the plaintiff's equity is affected by the conduct of the trustees,
 and that her position cannot be better than the position of her
 trustees. The case of *Lloyd's Banking Co. v. Jones* (1) is cited
 as an authority for this proposition, and my attention was also
 called, in this connection, to two Irish cases—*In re Ffrench's*
Estate (2) and *Bank of Ireland v. Cogry Flax Spinning Co.,*
Ld. (3) The facts in *Lloyd's Banking Co. v. Jones* (1) were very
 like the facts in the present case. A lady who under a will became
 entitled to leaseholds subject to an equitable mortgage to certain
 bankers settled them upon her marriage, the trusts being for
 herself for life, with remainder to the infant defendant. The
 trustees who took the legal estate made no inquiry for the deeds,
 which were with the bankers. The lady subsequently paid off
 the equitable mortgage, but left the deeds in the bankers' hands as
 security for her husband's overdraft. Under these circumstances
 the trustees were held to be postponed to the bankers. It was
 argued that the defendant had a better equity than the trustees.
 "I demur," said Pearson J., "to that proposition entirely. I
 think I should be introducing a most fatal doctrine if I were to
 say that, when the legal estate in property is vested in a trustee
 under a marriage settlement, the simple fact that his cestuis que
 trustent are ignorant what he is doing gives them a prior equity
 over any person who has dealings with him, and who is equally
 ignorant of the existence of the settlement and of the rights of
 the cestuis que trustent." The Irish cases referred to contain,
 at any rate, dicta to the same effect.

On the other hand, my attention was called to a series of
 authorities which do not appear to be entirely consistent with
 the principle enunciated by Pearson J. in the passage I have
 quoted. For example, there is the case of *Cory v. Eyre*. (4)
 In this case the trustee of an equitable mortgage transferred
 it to a purchaser for value who had no notice of the trust: it
 was held that the interest of the cestui que trust had priority
 over the interest of the transferee. It was argued that the
 cestui que trust was in no better position than his trustee,

(1) 29 Ch. D. 221, 227.

(3) [1900] 1 I. R. 219.

(2) 21 L. R. Ir. 283.

(4) 1 D. J. & S. 149.

PARKER J. because he was bound to make inquiries into the conduct of the trustee. It was held that there was no such obligation. 1907
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 Turner L.J. says (1): "The very first principle of trusts is, that the cestui que trust places confidence in his trustee, and if it is to be held that a cestui que trust is to be postponed upon the mere ground that he did not inquire into the acts or conduct of his trustee, that principle would, as it seems to me, be in a great measure, if not wholly, destroyed." Again (2), Turner L.J. in effect says that the possession of the title deeds gave the transferee of the mortgage no priority. It was not, he conceived, the doctrine of the Court that in the case of mere equitable interests priority could be gained through the medium of a breach of trust or duty. The decision in *Taylor v. London and County Banking Co.* (3) is to the same effect. In that case one Tasker, a trustee solicitor, having on behalf of himself and his co-trustee the deeds relating to the trust property, including a mortgage to himself alone, which had been duly transferred to him and his co-trustee, deposited this mortgage with his bankers by way of equitable security. In considering the equities as between the bankers and the cestuis que trust under the settlement Stirling L.J. said (4): "The ground of postponement relied on in this case is that the prior equitable claimants allowed Tasker to remain in possession of the title-deeds, including the mortgages to himself. There are undoubtedly cases (as, for example, *Waldron v. Sloper* (5) and *Farrand v. Yorkshire Banking Co.* (6)), where an equitable mortgagee who has allowed his mortgagor to retain or regain possession of the title-deeds has been postponed to a subsequent equitable incumbrancer who has obtained possession of the deeds. But where the relation between the equitable incumbrancer and the person in possession of the title-deeds is not merely that of mortgagee and mortgagor, but is of a fiduciary nature (as, for example, that of cestui que trust and trustee, or client and solicitor), there is a great body of authority to shew that the equitable incumbrancer is not to be

(1) 1 D. J. & S. 169.

(2) Ibid. 170.

(3) [1901] 2 Ch. 231.

(4) [1901] 2 Ch. 260.

(5) (1852) 1 Drew. 193.

(6) (1888) 40 Ch. D. 182.

deprived of his priority by reason of the improper acts of the person entrusted with the deeds, so long, at all events, as the incumbrancer has no ground to suppose that there has been any want of good faith on the part of the custodian of the deeds. The leading authorities on this point appear to be *Cory v. Eyre* (1), *Shropshire Union Railways and Canal Co. v. Reg.* (2), and *In re Vernon, Ewens & Co.* (3), before the Court of Appeal. This last case, in some of its features, bears a resemblance to the present. A client left in the hands of his solicitors 11,000*l.* for investment. The solicitors represented that this sum was invested on mortgage of certain specified property, and the client made no further inquiry. The solicitors were in fact the holders of a mortgage of 55,000*l.* on the specified property, and afterwards dealt with the mortgage by giving it up in exchange for other property in which they acquired an equity of redemption, and this equitable interest they subsequently sold. It was held that the solicitors must be treated as having become trustees for their client of 11,000*l.* out of the 55,000*l.* secured by the mortgage, and as having, as against the client, dealt improperly with this mortgage; and consequently that the latter was entitled to a charge on the substituted property. It was further held that the client was entitled to enforce this charge against the purchasers. Cotton L.J. made these remarks (4): 'Then there was a case of *Waldron v. Sloper* (5); and that is the case which may be said to be most like the present; but what was it? Waldron had an equitable security which was the first incumbrance on the property, and he put the deeds, not into the hands of a person who owed any duty to him, but into the hands of his mortgagor, and then that mortgagor kept them, without any inquiry from Waldron, and dealt with the property on the footing that he was entitled to the deeds. In my opinion that is an entirely different case from one in which a person lets his solicitor have his deeds in his hands, or trusts to his solicitor when the solicitor has undertaken a duty for him, and has, as in this case, made himself a trustee of that which he ought to

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(1) 1 D. J. & S. 149.

(3) (1886) 33 Ch. D. 402.

(2) L. R. 7 H. L. 496.

(4) *Ibid.* 409.

(5) 1 Drew. 193.

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PARKER J. have acquired in the name of his client, but has in fact acquired in his own name.' Then Cotton L.J. said (1): 'It is not a sufficient ground for postponing the client, for whom the solicitor had become a trustee, but was not openly a trustee, simply because the client had not made inquiry as to how the solicitor had performed his duty.' The same principle was applied by Chitty J. in *Carritt v. Real and Personal Advance Co.* (2), a strong case. I think that it must also be applied here."

It was urged in argument that *Cory v. Eyre* (3) and *Taylor v. London and County Banking Co.* (4) and the cases cited by Stirling L.J. in the passage that I have read are inconsistent with the principle enunciated by Pearson J. in *Lloyd's Banking Co. v. Jones* (5), and that I ought to treat that case as overruled. It is to be observed, however, that all these cases had reference to the conduct of trustees or persons in some other fiduciary relationship with reference to title deeds which they held in trust for or otherwise on account of the persons who were their cestuis que trust, or towards whom the fiduciary relationship subsisted, and the effect of such conduct on the rights of such persons respectively, whereas the case of *Lloyd's Banking Co. v. Jones* (5) related to the conduct of trustees in not getting possession of the title deeds. It may well be, therefore, that Pearson J.'s decision is right even if the principle he lays down is not one of general application to all cases. One at least of the two Irish cases which were quoted is open to a similar observation.

I have to ask myself, therefore, whether, so far as it affects the rights of their cestuis que trust, there is any real ground for drawing a distinction between the wrongful conduct of trustees in relation to title deeds in their possession as trustees and the wrongful conduct in relation to title deeds which as a fact never came into their possession, and are therefore never held by them upon trust at all. In my opinion there is such a real ground of distinction. In the former case the trustees hold the deeds for their cestuis que trust, and are bound to deal with them in

(1) 33 Ch. D. 410.

(3) 1 D. J. & S. 149.

(2) 42 Ch. D. 263.

(4) [1901] 2 Ch. 231.

(5) 29 Ch. D. 221.

accordance with the trusts upon which they are held. In the latter case the trustees never held the deeds for their cestuis que trust, and their breach of duty lies in not obtaining them. In the former case the trusteeship, so far as the deeds are concerned, is complete, and the deeds cannot be dealt with improperly if the trustees do their duty, and the cestuis que trust may fairly assume that they will do their duty. In the latter case the trusteeship, so far as the deeds are concerned, is incomplete, and the person who retains them is in a position to deal with them without reference to the trustees, so that the cestuis que trust have no one on whose possession of the deeds they are entitled to rely as standing between them and the perpetration of a fraud.

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I hold, therefore, in the present case, on the authority of *Lloyd's Banking Co. v. Jones* (1), that the plaintiff is in no better position than her trustees, and is postponed to the defendant.

I may perhaps add that, though I do not think that there has been any conduct on the part of the plaintiff since the settlement which could operate to postpone her equity if it were otherwise superior to the equity of the defendant, I am not at all satisfied that the omission of Messrs. Edell & Gordon to inquire for the title deeds may not be treated as her omission as well as the omission of the trustees. If instead of a settlement there had merely been articles of settlement between husband and wife prepared by a common solicitor and the deeds had been left in the husband's hands, and he had subsequently deposited them with his bankers to secure an advance, I think the bankers' equity might well have priority over the wife's equity, and I am not satisfied that the fact of there being an actual conveyance to trustees makes any difference in this respect.

Solicitors: *Edell & Gordon ; Helder, Roberts, Walton & Giles.*

(1) 29 Ch. D. 221.

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May 7, 8.*Lunatic—Committee and Receiver—Default—Accounts—Death of Lunatic—
Subsequent Receipts—Surety—Liability.*

The committee or receiver of the estate of a lunatic is not accountable in the lunacy, in his character of committee or receiver, for rents and profits received by him after the lunatic's death; and consequently, where the committee or receiver has made default, his surety is not liable in respect of any such receipts.

THIS was an appeal from a decision of the Master in Lunacy.

By an order dated June 16, 1896, William Walker was declared incapable of managing his affairs through mental infirmity. By an order dated February 26, 1904, C. W. Skinner was appointed receiver of the estate of the lunatic and authorized to exercise all the powers of a committee as in the case of a person of unsound mind so found by inquisition.

By a bond dated April 25, 1904, Skinner and the Ocean Accident and Guarantee Corporation, Limited, were bound in the sum of 300*l.* to answer the receipts of Skinner as such receiver. The terms of the bond are stated in the judgment of the Master of the Rolls.

On March 25, 1906, the lunatic died. On December 1, 1906, letters of administration to the estate of the deceased were granted to Mrs. Hope, the only daughter of the deceased.

On December 14, 1906, the usual order was made discharging the bond upon the passing of a final account by Skinner and payment by him to the administratrix of the balance found to be due from him. The estate of the lunatic consisted of certain freehold shops at Norwood.

On taking the account in chambers it appeared that at the death of the lunatic there was a balance due from Skinner of 200*l.* 14*s.* 6*d.*, and that at the date of the final order of December 14 there was a further sum of 170*l.* 3*s.* 3*d.* due from him in respect of rents which he had collected since the death of the lunatic. Skinner had made default, and it appeared there was no possibility of obtaining payment from him.

The question was raised before Master Fischer whether the account against Skinner ought to be taken down to the date of the final order, in which case the sureties would be liable to the full extent of the bond, or only down to the death of the lunatic, in which case the sureties' liability would be limited to the 200*l.* 14*s.* 6*d.*

The Master directed the account to be taken down to the date of the last receipt and payment by the receiver. From this decision the sureties appealed.

Gatey, for the appellants. On the terms of the suretyship bond the surety is only liable during the life of the lunatic; the "estate" received and receivable by the receiver must be limited to the lifetime of the lunatic, and the responsibility of the surety ends with his death. The jurisdiction of the judge in lunacy is confined to the lunatic only while alive, and the jurisdiction ceases with his death. The same rule applies to a receiver or committee of the estate. The effect of payments by a committee after the death of the lunatic was considered in *Jones v. Noyes*.⁽¹⁾ Rule 81 of the Lunacy Rules, 1890, prescribes what is to be done on the death of the lunatic; the account is to be taken as from the death, and if the taking of it is delayed that cannot prejudice the right of the surety. The Master, therefore, was wrong in making the surety responsible for defalcations made after the death of the lunatic.

Boome, for the administratrix. There has been no laches; it was not possible to get these accounts taken sooner. The receiver is an officer of the Court until he gets his discharge upon passing his accounts, and he is liable until discharged. The death of the lunatic does not ipso facto discharge the receiver. The liability of a receiver and his surety is fully discussed in *In re Graham*.⁽²⁾ The jurisdiction of the Court over a committee of the estate does not cease with the death of the lunatic: *In re Fitzgerald*.⁽³⁾ If these rents had not been received by the committee there was no other hand to receive them. He was the proper person to take and account for them. A surety is not entitled to be

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(1) (1858) 7 W. R. 21.

(2) [1895] 1 Ch. 66

(3) (1805) 2 Sch. & Lef. 432.

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discharged until he has paid all that his principal was liable to pay: *Dawson v. Raynes*. (1) Rule 81 of the Lunacy Rules does not specify up to what date the account is to be taken.

[He also referred to Story's Equity Jurisprudence, 12th ed. p. 319, par. 325A.]

COZENS-HARDY M.R. This appeal raises a curious and important point, and one upon which, possibly, it is rather strange there is no direct authority; but, looking at it as a matter of principle, apart from authority, and apart also from the language of the particular documents which I shall have to allude to, it seems to me that the matter is reasonably clear.

The lunacy jurisdiction is, of course, a very peculiar one. It is vested in persons who are entrusted with authority, the lunacy authorities, and it is a jurisdiction which is dependent upon a continuance of the lunacy, and, therefore, necessarily in one event upon the continuance of the existence of the lunatic himself. By that I do not mean, of course, that a committee or a receiver is not liable to account after the death of the lunatic. That would be an absurdity too gross to contemplate. To take the common case of a receiver appointed in a suit, if that suit is dismissed the receiver is still liable to account under the order of the Court for moneys which he has in his hands obtained by him while receiver during the pendency of the suit. In the same way the death of the lunatic does not in the least operate to release the committee or receiver from accounting for anything which he receives in that character. But this case goes further; it is now said that the committee or receiver after the lunatic's death, and with knowledge of his death—whether that be important or not, I do not think it matters here—went on and received rents and profits of the late lunatic's estate, and it is said that he is accountable in the lunacy in his character of receiver or committee for the rents so received, and Master Fischer has proposed, in issuing his certificate for the final balance, to include these receipts. Now the sureties under the surety bond say that is not so. They say that they were only sureties for the committee in respect of rents received by him in that character, and that they

(1) (1826) 2 Russ. 466.

are not liable for his receipts after the death of the lunatic which it was no part of his duty as committee or receiver to receive; they were receipts which undoubtedly render the man liable to account to the true owner, but with which the lunacy jurisdiction has nothing to do. That is the way it is put, and on principle I can see no answer to it. I asked Mr. Boome what would happen if the lunatic in this case had been simply tenant for life instead of the owner in fee. The order appointing him committee or receiver would have been in the same common form. It could not really be said that after the death of the lunatic the committee would have any right to say that the rents which he received must be taken to have been received by him as committee or receiver, and must, therefore, be paid into the lunacy account. That seems to me a perfectly good proposition.

Can it be said in the present case that there is anything in the form of the order, or of the bond, which makes any difference? First of all, we have the bond. The appointment was in the common form according to the Act. He is appointed receiver and committee of the estate, and he undertakes to apply all such moneys as he receives belonging to William Walker or his estate in such manner as the Master shall direct. Then the bond is in these terms—after reciting the appointment—that if Skinner (that is, the receiver or committee) “shall yearly or oftener if he be thereunto required make a just and true account of all and singular the rents issues and profits of the real estate of the said William Walker and also of his personal estate and the profits thereof as now are or hereafter shall come to his hands custody or possession or which he may receive out of or concerning the said estate and shall carefully observe and perform and keep the orders and directions of the judge named in the said Acts or of the said Master for the time being made or hereafter to be made touching or concerning the said William Walker or his estate and touching all such moneys as shall yearly remain due upon the foot of the account duly taken by the said Masters”—and then there are some things that I shall omit—“and shall in all things demean himself as a careful and faithful receiver of the estate of the said William Walker that then the said obligation to be void.” Reading that, it seems to

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me there is no ground whatever for saying that that was or would have been an excess of jurisdiction upon the part of the lunacy authorities; it seems to me that every word of that is satisfied by holding that it applies simply to acts done in discharge of his duty as committee and to amounts coming to his hands, custody or possession as receiver of the estate. Those cease with the death, not in the sense that he is not bound to account for receipts during the life, but in the sense that he has no right to receive anything after the death of the lunatic.

Then is there anything in what is called the final order of December 14? So far from there being anything in favour of the contention, it seems to me there is a very strong argument against it. The order recites the certificate, it recites the death and other matters, and then it says, "I do order that on the passing of the final account by the said Skinner"—of what—"of his receipts and payments as such person appointed as aforesaid." That is a perfectly accurate definition of the legal position, and to say that that means the final account by Skinner of his receipts and payments as such person appointed aforesaid up to the death of the lunatic, and also of receipts and payments after the death, would, I think, be a wrong construction. One difficulty might have arisen which has been avoided by the form in which this application is made. The bond contains a provision of a very salutary and proper kind, that when once a certificate has been given under the seal of the Master of the amount which Skinner is liable to pay, that is conclusive, and cannot be questioned; and if this certificate had been allowed to go it would have been idle for the surety in face of that finding to have gone behind the certificate. No such certificate has been given, and this is an application which raises the point whether the certificate ought to include such receipts. For these reasons I think the present application succeeds. Master Fischer was wrong in the view which he took, and the certificate ought to stop with the receipts at the death of the lunatic.

KENNEDY L.J. I am of the same opinion. The Master of the Rolls has so very clearly stated the grounds for his conclusions that I only wish to add a very few words.

It seems to me that the word "estate," either in the appointment of a committee or in the bond, cannot enlarge the jurisdiction of the authority in lunacy, namely, the jurisdiction relating to the affairs of the lunatic while that person remains a lunatic living under the care of the Court as the authority in lunacy. When that period of care is ended by the death of the lunatic any further transaction which the committee and receiver enters into cannot be said to be within the terms of the appointment. The only point which struck me at an early stage of the case as possibly affording some sort of case lay in the suggestion that there was some bar in the nature of an estoppel to the surety's contention. Could the committee have been held to be estopped from saying, "Yes, I received these sums, but I am not going to account to you, the Master, because I received them after the death of the lunatic with the knowledge of the death, and the person to call me to account is not you, but the persons to whom the funds ought to have come or the persons who ought ultimately to have a right to see how those funds are dealt with?" And thus, further, could it be said that his surety, who has entered into engagements for the faithful performance of the duties of the committee and receiver, is not in difficulty in denying his liability for acts which he, the committee and receiver, would, on the assumption I have put, be estopped from disputing? I think when the true facts of the case are really understood there is no estoppel at all. The authority in lunacy cannot ask the committee or receiver to account for these sums. He may say, "I may improperly, I may even dishonestly have received them, but at the time I was doing it I could not be an officer of the Court, because the limitation of my appointment had operated, and, before I received the moneys in question, I had ceased to be a person who had any right as committee or receiver to receive or to deal with these funds; and it is not to you, at any rate, that I am accountable." I think it may be tested by the converse case of payments. Supposing the committee and receiver had made payments after the death of the lunatic and sought to get credit for them in passing the account. How could he discharge himself on the credit side of his account by payments which he had no jurisdiction to make because the

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C. A. period of his duties had come to an end? I am of opinion that
 1907 when the matter is fully considered it is quite clear that the sums
 WALKER, in question are moneys for which he may be called upon to
In re. account to the proper person, but he can say, and, therefore, his
 Kennedy L.J. sureties can say, they are not moneys for the receipt of which he
 is accountable as the committee and receiver in lunacy.

Solicitors: *Mellor & Co.; Harold G. Morrish.*

G. A. S.

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In re TURNER.
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[1905 T. 437.]

Nov. 29.
 1907
 C. A.
 May 8.

Solicitor—Charging Order—Property “Preserved”—Solicitors Act, 1860
(23 & 24 Vict. c. 127), s. 28—Administration Action—Trustees Defendants
—Compromise—Costs of all Parties—Provision for Payment—Result of
Action—Destruction of Trust Estate—Property Managed and Retained—
Assets insufficient for Payment of Costs—Costs of Plaintiff’s Solicitors—
Costs of Trustees—Trustees’ Right of Indemnity—Priority.

In an action by beneficiaries under a will against the trustees for, inter alia, execution of the trusts of the will, an account of the testator’s business, which had been carried on by the trustees under a power in that behalf, and administration, a receiver and manager of the business was appointed on motion, and the action was ultimately compromised at the trial, one of the terms of compromise being that the costs of all parties should be paid out of the estate, including in the costs of the trustees all costs, charges, and expenses incurred by them as executors and trustees of the will. In the result the action proved disastrous to the trust estate, the business, which previously had been profitable, having to be closed down for want of capital, and the assets of the estate being insufficient to pay the costs of all parties. On an application by the plaintiffs’ solicitors for a charging order for their costs under s. 28 of the Solicitors Act, 1860, and by the trustees for a declaration of priority in respect of their costs, charges, and expenses:—

Held by Kekewich J., applying *Baile v. Baile*, (1872) L. R. 13 Eq. 497, that, inasmuch as the property had been managed and retained for the rightful owners, it had been “preserved” within the meaning of s. 28; that it did not matter that in fact the property when it had been preserved for the benefit of the parties entitled yielded little or nothing for them; and that in the circumstances the plaintiffs’ solicitors were entitled to a charging order for their costs; but

Held further by Kekewich J., that, having regard to the long-established practice of the Chancery Division indemnifying trustees

for all expenditure properly incurred in relation to their trust estate, and also to the express terms of the compromise, the defendant trustees were entitled to payment of all their costs, charges, and expenses in priority to the charging order obtained by the plaintiffs' solicitors.

Decision of Kekewich J. affirmed.

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In this case there were two summonses in the above-mentioned action, the first being issued by the solicitors to the plaintiffs for a charging order under s. 28 of the Solicitors Act, 1860, in respect of the taxed costs of the plaintiffs under the consent judgment in the action, and the second summons being issued on behalf of the defendant trustees claiming a declaration of priority in respect of their taxed costs, charges, and expenses as trustees.

The plaintiffs, who were two married daughters of the above-named testator, each entitled to a share of the testator's residuary estate, subject to their mother's life interest, commenced the action against the trustees (one of whom was the sole executor) and another beneficiary, alleging breaches of trust and asking for execution of the trusts of the testator's will, an account of the testator's business which had been carried on by the trustees under a power in that behalf, the cancellation of a deed of family arrangement, removal of one of the defendant trustees, and administration.

A receiver and manager of the business was appointed on motion, upon the hearing of which the defendants agreed to give up the deed of arrangement to be cancelled. The action went on, but the parties subsequently agreed to compromise it upon the terms, *inter alia*, that the deed should be cancelled, that the plaintiffs should be appointed new trustees of the testator's will, that the business should be managed as therein mentioned, and that the costs of all parties of and incidental to the action, including the costs of all matters preceding and leading up to the action and including in the costs of the defendant trustees the costs of the preparation, execution, and completion of the deed of family arrangement and all costs charges, and expenses incurred by them as executors or trustees of the will and not already paid out of the estate, should be

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taxed as between solicitor and client and paid out of the estate. Upon the action coming on for trial a judgment by consent was taken, embodying the terms of the compromise.

In the result the action proved disastrous to the trust estate, for the business, the profits of which, as the plaintiffs believed and alleged, were between 2000*l.* and 2500*l.* per annum before action brought, had to be closed down altogether for want of capital, and the assets of the estate were not expected to realize sufficient to pay the taxed costs of all parties.

In these circumstances the above-mentioned summonses were taken out.

The summonses were heard before Kekewich J., on November 29, 1906.

Stewart-Smith, K.C., and *J. H. M. Ryan*, for the solicitors, the applicants on the first summons. We submit that the applicants on the first summons are entitled to a charging order under s. 28 of the Solicitors Act, 1860 (23 & 24 Vict. c. 127) (1), on the property which they say was preserved by means of the administration proceedings. The granting of a charging order is in the discretion of the Court, and can be made equally well whether the preservation is the result of a judgment in the action or of a compromise of the right of action: *Twynam v. Porter*. (2)

A charging order is given in respect of property which has

(1) Sect. 28 of 23 & 24 Vict. c. 127, so far as it is material, is as follows: "In every case in which a solicitor shall be employed to prosecute or defend any suit, matter, or proceeding in any Court of justice, it shall be lawful for the Court or judge before whom any such suit, matter, or proceeding has been heard, or shall be depending, to declare such solicitor entitled to a charge upon the property recovered or preserved, and upon such declaration being made such solicitor shall have a charge upon and against and a right to payment out of the property, of

whatsoever nature, tenure, or kind the same may be, which shall have been recovered or preserved through the instrumentality of any such solicitor, for the taxed costs, charges, and expenses of or in reference to such suit, matter, or proceeding; and it shall be lawful for such Court or judge to make such order or orders for taxation of and for raising and payment of such costs, charges, and expenses out of the said property as to such Court or judge shall appear just and proper. . . ."

(2) (1870) L. R. 11 Eq. 181.

been "recovered or preserved," and is therefore in the nature of salvage—*Baile v. Baile* (1); *Greer v. Young* (2)—and ought to override the interest of all parties in the property preserved.

On the question raised by the second summons we submit that over salved property the plaintiffs' solicitors have the first right. Solicitors were held entitled to a charging order over mortgaged property which had been preserved in priority to a prior mortgage: *Scholey v. Peck* (3); and in *In re Sufield and Watts* (4) it is put very clearly by Fry L.J., who said: "In my opinion, the right of the solicitor to priority is made plain by the words of s. 28. I take that section to amount to a statutory declaration that, when the Court has declared a solicitor entitled to a charge on 'property recovered or preserved,' the charge is to have priority over the claims of every one except a bona fide purchaser for value without notice. Subject to that, the solicitor's charge takes priority over every other claim."

The trustees would not have had any property out of which they could have taken their costs if it had not been for this action, and they can only have them subject to the prior right of the solicitors.

P. O. Lawrence, K.C., and *T. K. Crossfield*, for the trustees. It is a question of fact in each case whether any property has been preserved: per Lord Selborne L.C. in *Pinkerton v. Easton* (5); and here the estate has been destroyed by the plaintiffs' action. In all the cases where a charging order has been granted there has been preservation for the benefit of some one; but there is no instance of a charging order having been given where the proceedings have resulted in the destruction, and not the preservation, of the property.

In *Baile v. Baile* (1) it was preserved for the benefit of the infant, and in *Greer v. Young* (2) Bowen L.J., speaking of the section, says: "It authorizes a charge not on the mere interest of the plaintiff but on all property recovered in the action whatever, for the plaintiff only, or for him in connection with others." *Briscoe v. Briscoe* (6) is another instance in point.

(1) L. R. 13 Eq. 497, 508.

(2) (1883) 24 Ch. D. 545, 556.

(3) [1893] 1 Ch. 709.

(4) (1888) 20 Q. B. D. 693, 698.

(5) (1873) L. R. 16 Eq. 490, 493.

(6) [1892] 3 Ch. 543.

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Where the costs exceed the value of the property, the result of the proceedings is not to recover or preserve, but to destroy. In this case there has in fact been no preservation of the property the subject-matter of the suit. The widow has derived no benefit at all, but, on the contrary, has lost all her income.

Then, further, the charging order is discretionary: *In re Humphreys* (1); and if the Court exercises its discretion in favour of the solicitors, it will be disturbing the contractual rights of the trustees to have their costs and expenses paid out of the trust fund. They have done nothing to disentitle them to their costs, and where the assets are insufficient for the payment of all parties' costs in full, trustees do not rank *pari passu* with, but take priority to, the other parties: *In re Griffith*. (2) Although there is no rule as to the order of payment of costs similar to the Bankruptcy Rule No. 125, yet it is the established practice of the Chancery Division that trustees shall always have priority for their costs.

Moreover, the applicant solicitors have not shewn that the plaintiffs cannot pay their own solicitors' costs themselves, and the plaintiffs are *prima facie* responsible: *Harrison v. Harrison*. (3)

Stewart-Smith, K.C., in reply. The solicitors are not disentitled to a charging order by reason of the mere fact that they have not succeeded in preserving enough to pay their own and the trustees' costs. I submit that they are entitled to a charging order in any event, and that there is no such hard and fast rule for the payment of trustees' costs as suggested. Trustees may well forfeit their right to priority by misconduct. The plaintiffs are married women, and have no property other than what they were entitled to out of the testator's residuary estate.

KEKEWICH J. This is a matter of some importance. It affects solicitors, for whose benefit the 28th section of the Solicitors Act, 1860, was expressly passed; and it affects trustees, who are much concerned with the security which they certainly generally enjoy of being able to recover all their costs, charges, and expenses. I

(1) [1898] 1 Q. B. 520.

(2) [1904] 1 Ch. 807.

(3) (1888) 13 P. D. 180.

am not speaking only of the costs of an action, but costs, charges, and expenses generally; everything, that is, to which they are liable to solicitors as well as to other agents, out of the trust estate. If I decide in favour of the solicitors, I oust the trustees; if I decide in favour of the trustees, I oust the solicitors, because it is common ground that the fund available for payment of the costs is insufficient to pay both, or, as I understand it, to pay more than one.

The first question is, whether the case is one in which the Court may on the proper construction of the 28th section, and having regard to the facts, make a charging order. I have heard a considerable amount of argument on the facts, and a good many cases have been cited.

This was a hostile litigation respecting the trusts of a will, under which will a mother and children take interests in other property, not of considerable amount, but particularly in a business as regards which certain rights were given to sons as beneficiaries and as trustees. A deed of family arrangement had been executed, to which I need not refer in detail, and which was afterwards attacked as having been improperly executed; and a writ was issued asking for every variety of relief that the ingenuity of the pleader could suggest. The writ was followed up by a statement of claim of a most hostile character. The deed which was attacked had to go, and it went by agreement, but I may take it that it went by agreement because those whose duty it was to support it were advised that, at any rate, if they had a defence, it would be better not to put it forward. Then the action went on and came to trial, and at the trial there was no judgment of the Court, but the parties compromised the case, the result of which was that the business or the proceeds of the sale of the business remained, and the estate had to be administered and distributed according to the terms of the compromise and the rights of the parties thereby defined, subject, of course, to the payment of costs. I am asked to say that under these circumstances the property, including the business, was not preserved within the meaning of the Act.

It is extremely difficult to say what is meant by "preserved," but there is one case which gives me a few words which seem to

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me to be applicable. I do not quote them as a whole, and I see that there is some difficulty in applying the passage in its entirety to this or any other case, but *Wickens V.-C. in Baile v. Baile* (1) speaks of a property being preserved when it "is managed and retained for the rightful owner," and adds, "instead of being left to the first comer," which addition seems to imply the danger which he indicated in the other examples he had previously given, namely, of an estate preserved against an adverse claimant, and of an estate preserved by keeping a sea-wall in repair; and that perhaps makes it more difficult to use his words "managed and retained." Still I think I may take those words as giving me a guide as to what comes within the word "preserved." This property has been managed and retained. A receiver was appointed, and the deed which affected the property was got rid of. The estate, although not administered by the Court under an administration judgment or anything of that kind, has been taken care of and administered under the terms of the compromise agreed to at the trial, and, therefore, must be taken to express, not the extreme rights of either side, but what might reasonably be conceded by the one to the other as being the rights of the parties. That seems to me to point to management and retainer. I do not think that in the other cases there is any guide in language to the meaning of the word "preserved" useful to the present case.

Then it is said that the property has not been managed for any person's benefit. In one sense, unfortunately, that is too true. The only thing remaining is a small sum of money which, as I have already mentioned, is not sufficient for the costs of the two parties who are now contending for their costs. But still there it is. It is, unfortunately, very small, but the estate has been in that sense preserved and is available for those who are entitled to it.

Then my attention has been called to the position of the widow. She was entitled to the profits under the will, and it is said that nothing has been done for her benefit. If it rested entirely on that there would be more to say in favour of the principle put forward that there had been no preservation for the

benefit of anyone ; but, as I have already said, I think the property has been preserved within the meaning of the Act for the benefit of the parties entitled. And again, to make sure that I am understood, I repeat that it does not seem to me to matter that in fact, unfortunately, the property, when it has been preserved for the benefit of the parties entitled, yields little or nothing for them.

Therefore it seems to me that I have a case here where the Court may properly, if it thinks fit, exercise a discretion in favour of the solicitors. But it is discretionary. I have that distinctly laid down in *Greer v. Young* (1) in the judgment of Bowen L.J., and even more pointedly and distinctly laid down by the Court of Appeal in *In re Humphreys* (2) in the judgment of the Court delivered by Chitty L.J. And the question arises whether this is a case in which I ought to exercise the discretion, which is a judicial discretion, of course one which may be submitted to the Court of Appeal, as was in fact done in *In re Humphreys* (2), but still it is a discretion.

The main ground for urging that I ought not to exercise the discretion in favour of the solicitors is one deserving a grave consideration. I shall put aside all others ; they are small, and I doubt whether they are entitled to any weight at all. But there is one of great importance. It is said that if I give the solicitors this charging order, then they will not only oust the trustees, as they undoubtedly will, and leave them out in the cold altogether, but that they will oust them from a right which is recognized in this Court as established, not by any rule in books of practice, but by a rule which is part of the system of the Court itself, and has been repeated in the strongest terms for generations, if not for centuries. That is the rule to which I referred at the commencement of my remarks, that a trustee besides his right against his cestui que trust, which is one of the largest character, and has been laid down in very plain terms by the recent judgment of the Privy Council in *Hardoon v. Belilios* (3), has a right against the trust property. He can charge nothing for himself ; he can make no profits ; but he is entitled to be paid every penny

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(1) 24 Ch. D. 545, 556.

(2) [1898] 1 Q. B. 520.

(3) [1901] A. C. 118.

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which he incurs on behalf of the trust estate, and he is entitled to go against the trust estate and have every penny raised out of that trust estate, so that he will be fully indemnified. It is of the utmost importance that that privilege should be upheld. The Court of Chancery has always regarded it as of the utmost importance to the State that persons should be found who will, on gratuitous terms, undertake trusts and discharge duties to families and friends, of a very troublesome and responsible character, and it is impossible to expect that gentlemen will be found to do that unless they have an indemnity against, I will not use the word "costs," but against every penny incurred by them in discharge of their duties. There is a rule in bankruptcy mentioned in the passage from *In re Humphreys* (1) to which I am about to refer providing for the priority of costs, and in that case importance was attached to it. To my mind the rule concerning trustees to which I have referred, and which is the established doctrine of the Court of Chancery, is far higher than that. It has a greater sanction than any rule, and is to my mind of far greater importance. If I decide in favour of the solicitors in this case, I shall tell the trustees that they will go without payment of their costs out of this fund. They must be left to look for those costs to their cestuis que trust, who ex concessis cannot pay them. I ought not to do that without grave consideration.

In the case of *In re Humphreys* (1), to which I have already referred, the decision did not go wholly upon that view, but in a considered judgment of the Court delivered by Chitty L.J., in which he expressed the judgment of all his colleagues, great weight was laid on the priority in the payment of costs being observed in bankruptcy, and the learned judge, in giving judgment, says: "Still there may be occasions on which it would be right to make the order, seeing that the ordinary right of the solicitor to be paid for his services out of the estate is only through the right of the trustee to obtain the costs out of the estate." He said there may be occasions, but he obviously intended to mean and really did say that those occasions could not be of frequent occurrence.

(1) [1898] 1 Q. B. 520, 526.

Is this a case in which I ought to disregard the claims of the trustees? It is urged on behalf of the solicitors that I ought, and for this reason. It is said that the trustees were charged with a breach of trust; that the deed which has been set aside shews that they were not trustees entitled to any consideration; and that, therefore, I am not dealing here with trustees in the abstract, but with trustees in particular into whose conduct I am allowed to look, and about whom I ought to say that they ought not to receive the consideration of the Court.

I do not find all that in the facts; but a complete answer seems to me to be found in this, that the terms of compromise which were arranged and carried through by the solicitors who are now opposing the costs of the trustees provided for the payment of those trustees' costs in full in the most liberal manner which the Court allows, including, of course, all their costs, charges, and expenses properly incurred. It seems to me that, with that order before me, it is impossible for me, on the evidence of what occurred, to take these particular trustees out of the character of ordinary trustees entitled to the protection of the Court and entitled to charge their costs—and I use again the expression, every penny they have incurred on behalf of the trust estate—against that estate.

It seems to me, therefore, that as I am bound, if I decide in favour of one, really to put the other out, that I ought to decide in favour of the trustees rather than in favour of the solicitors, and I am confirmed in that by this:—These solicitors took up this litigation knowing that they were dealing with a trust estate, knowing, as of course they did as solicitors, that a trustee had a charge on the trust estate for his costs, and if it came to a question of priority those costs would be paid in priority to the costs incurred by the plaintiffs. The solicitors must be taken to have prosecuted the litigation in face of that knowledge, running the risk of not getting their costs until all those trustees' costs had been paid. In other words, if the trust estate was not sufficient to pay the costs of both, but was only sufficient to pay the costs of the trustees, the solicitors must be taken to have been content to fall back on their own clients. Of course, that is no answer to the claim under the Act if it is

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once established. But when it comes to the question of discretion, it seems to me that that is another reason for upholding the right of the trustees, and saying that the solicitors must be postponed.

The result is that the summons of the solicitors will be refused, and I must refuse it with costs, and the declaration of priority as asked will be made on the trustees' summons.

R. M.

C. A. From this decision the plaintiffs' solicitors appealed. The appeal was heard on May 8, 1907.

Stewart-Smith, K.C., and *J. H. M. Ryan*, for the appellants, repeated the arguments used in the Court below.

P. O. Lawrence, K.C., and *T. K. Crossfield*, for the respondents, were not called upon.

COZENS-HARDY M.R. I am of opinion that the judgment of Kekewich J. was perfectly right, and I have nothing to add to it.

SIR GORELL BARNES, PRESIDENT. I am of the same opinion.

KENNEDY L.J. I agree.

Solicitors: *Minchin & Co.*; *Cain & Tompkins*.

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Landlord and Tenant—Determination of Tenancy—Lease for Term of Years—Express Tenancy at Will created on Expiration of Term—Implied Incorporation of Terms of Lease—Arbitration Clause—Action for Occupation Rent—Staying Proceedings—Arbitration Act, 1889 (52 & 53 Vict. c. 49), ss. 4, 27.

A colliery lease, which empowered the lessees to carry foreign coal over the surface, provided that all disputes relating to the lease should be referred to arbitration. Shortly before the expiration of the term the lessees by letter requested the lessors to grant an extension of the lease on the existing terms for six months, and the lessors wrote in reply that the lessees might consider themselves tenants at will of both mine and way-leave pending further arrangements. The lessors having brought an action against the lessees in respect of their exercise of the way-leave during the tenancy at will, the lessees applied for a stay of proceedings under s. 4 of the Arbitration Act, 1889:—

Held, upon the construction of the letters, that the terms of the lease, including the arbitration clause, applied to the tenancy at will, so far as applicable to such a tenancy, and that the proceedings ought to be stayed.

Per Cozens-Hardy M.R. : Where on the expiration of a lease the lessee is expressly authorized to continue in possession as tenant at will, in the absence of evidence of a contrary intention, the terms and conditions of the original lease apply to the tenancy at will so far as they are consistent with such tenancy.

APPEAL from a decision of Neville J.

By an indenture of lease dated January 13, 1882, the then trustees of certain hereditaments called the Lichfield Conduit Lands, with the consent of the Charity Commissioners, demised to Messrs. J. & W. B. Harrison, their executors, administrators and assigns, certain coal mines in Staffordshire, known as the Little Wyrley Colliery, with liberty to get, raise, and carry away the produce of the said mines as therein mentioned, including a right to make railways and tramways and draw adjoining and other mines of the lessees over the surface lands under which

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the demised minerals lay and through the said demised mines, and for those and other purposes to enter and occupy any part of the said surface lands so long during the term thereby granted as the lessees, their executors, administrators or assigns, should require the same, to have and to hold the said mines, rights, privileges and premises unto the lessees, their executors, administrators and assigns, for the term of twenty-eight years from March 25, 1877, yielding and paying the rents therein mentioned, which comprised a royalty, a minimum rent, and a surface rent. And the lease contained a proviso that any question or controversy which should arise between the trustees, their successors or assigns, and the lessees, their executors, administrators or assigns, concerning the matter of the said indenture of lease or relating thereto should be referred to arbitration, and also a proviso giving an option to the lessees, their executors, administrators and assigns, to renew the lease for the further term of seven or fourteen years upon giving six months' notice prior to the expiration of the term. In exercise of their powers under the lease the lessees constructed a tramway over part of the said surface lands. Subsequently the demised premises, including this tramway, became vested in the defendants for all the lessees' interest therein. By an oversight on the part of the defendants' colliery manager the fact that the lease was about to expire was not brought to the notice of the defendants until a few days before the date of expiration, March 25, 1905, and consequently no notice of renewal was given. On March 22, 1905, Mr. W. E. Harrison wrote on behalf of the defendants to Mr. A. E. Chinn, the warden of the Lichfield Conduit trustees, as follows :—

“Dear Sir,—Owing to an omission on the part of our colliery manager no notice was given you six months prior to the determination of our lease. There being still roughly between four and five acres of coal to work I shall be glad if you can see your way of [*sic*] granting an extension of the lease on the present terms until the 29th September next. Awaiting your reply,

“I am yours faithfully,

“W. E. Harrison.”

On the same day Mr. Chinn, on behalf of the trustees, replied as follows:—

“LITTLE WYRLEY COLLIERY LEASE.

“Dear Sir,—I will lay your letter of to-day before the trustees at their next meeting. In the meantime will you please consider that Messrs. Harrisons [*sic*] are tenants at will of both mine and way-leave until an arrangement can be carried out?

“Yours faithfully,

“A. E. Chinn,

“Warden.”

Some further correspondence ensued, but no permanent arrangement was ever come to, and on January 18, 1906, Mr. Chinn, on behalf of the trustees, gave notice to the defendants to deliver up possession within twenty-four hours of the mines and surface, including the tramway. The defendants gave up possession on February 6, 1906.

On March 14, 1907, this action was commenced by the existing trustees of the Lichfield Conduit Lands against the defendants for a declaration that the plaintiffs were entitled to damages for the user by the defendants of the tramway in question after the expiration of the lease of January 13, 1882, and for certain other relief not material to be mentioned for the purposes of this report.

On the following day, March 15, the plaintiffs gave notice to the defendants requiring that certain disputes arising under the lease should be settled by arbitration, and notifying the appointment by the plaintiffs of an arbitrator.

On March 23 the defendants gave notice to the plaintiffs requiring that the arbitration should be extended to the matters in dispute in the action and stating that they had appointed an arbitrator.

The plaintiffs having failed to comply with this notice, the defendants moved under s. 4 of the Arbitration Act, 1889, for a stay of all further proceedings in the action, upon the ground that the plaintiffs and the persons through whom the defendants claimed had under the submission contained in the lease of January 13, 1882, agreed that all questions concerning the lease should be referred to arbitration, and that the tenancy of the defendants

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subsequent to the expiration of the term granted by the lease was upon the like terms as those of the lease.

Neville J. refused the motion so far as it related to the user of the tramway since the expiration of the lease.

The defendants appealed, but confined their notice of appeal to so much of the action as related to matters arising during the tenancy at will.

Abel Thomas, K.C., and Sargent, for the defendants. Where a tenant for a term of years holds over after the expiration of his lease and pays or expressly agrees to pay rent at the same or an enhanced rent, in the absence of evidence to the contrary, a new tenancy from year to year is created upon the same terms as those of the expired lease so far as the same are not inconsistent with a yearly tenancy: *Right v. Darby* (1); *Doe v. Bell* (2); *Digby v. Atkinson* (3); *Johnson v. Churchwardens of St. Peter, Hereford* (4); *Hyatt v. Griffiths* (5); *Dougal v. McCarthy*. (6)

[SIR GORELL BARNES, PRESIDENT. In Woodfall's Law of Landlord and Tenant, 17th ed. p. 253, it is stated that, "if a tenant whose lease has expired be permitted to continue in possession pending a treaty for a further lease, he is not a tenant from year to year, but a tenant strictly at will"; and that is supported by *Doe v. Stennett*. (7)]

So far as regards the incorporation of the terms of the old lease, there is no distinction between a yearly tenancy and a tenancy at will. The doctrine is stated quite generally by Lord Ellenborough in *Digby v. Atkinson*. (3) There is a general presumption, in the absence of evidence of a contrary intention, that when a relationship between two or more parties is created for a given term, and is continued beyond the expiration of the term, it is continued upon the old terms and conditions so far as they are not expressly varied and are not inconsistent with the terms of the new holding; and the variation of a particular

(1) (1786) 1 T. R. 159.

(4) (1836) 4 Ad. & E. 520, 526.

(2) (1793) 5 T. R. 471.

(5) (1851) 17 Q. B. 505.

(3) (1815) 4 Camp. 275.

(6) [1893] 1 Q. B. 736.

(7) (1799) 2 Esp. 717.

term does not rebut the presumption as to the rest. This presumption is not limited to a tenancy from year to year, but applies equally to a monthly or weekly tenancy or to a tenancy at will; and, further, it is not limited to the case of a tenancy at all—it applies, for instance, to the continuation of a partnership beyond the term fixed by the articles: *Neilson v. Mossend Iron Co.* (1) Therefore every term of this lease which is not inconsistent with a tenancy at will is incorporated. That includes the arbitration clause. *Gillett v. Thornton* (2), where it was held that an arbitration clause in a partnership agreement remained in force where the partnership continued beyond the term limited by the agreement, applies by analogy. Lastly, upon the construction of the two letters of March 22, the inference is irresistible that the intention of the parties was that the lessees should continue in possession upon the old terms.

Butcher, K.C., and *MacSwinney*, for the plaintiffs. In certain cases it is presumed that the tenancy is continued on the old terms, but it is an inference of fact in every case. Where a tenant holds over and nothing is said as to rent or other terms, there is a mere tenancy at will, and no presumption arises that the terms of the old lease shall remain in force; but the moment that rent is paid or agreed to be paid, and the tenancy becomes a tenancy from year to year, then the presumption arises. In order to make the old terms apply, it is essential that there should be some element of fixity of tenure. The law is accurately summarized in *Foà on Landlord and Tenant*, 3rd ed. p. 354. There is a great distinction between a tenancy at will and a tenancy from year to year. Of course, if the parties say what are the terms of the tenancy at will the tenancy is governed by those terms, but otherwise the appropriate remedy is for use and occupation simply: *Doe v. Stennett* (3); *Gibson v. Kirk*. (4) This is really nothing more than a licence to the tenants to work the mines and use the tramway. Further, there is no submission in writing within s. 27 of the Arbitration Act, 1889, so as to give the Court jurisdiction to send this case

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(1) (1886) 11 App. Cas. 298.

(3) 2 Esp. 717.

(2) (1875) L. R. 19 Eq. 599.

(4) (1841) 1 Q. B. 850, 856.

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to arbitration. The submission must be in writing signed by both parties: *Caerleon Tinplate Co. v. Hughes*. (1)

[COZENS-HARDY M.R. That is qualified by *Baker v. Yorkshire Fire and Life Assurance Co.* (2)]

At any rate there is no submission here within the Act.

COZENS-HARDY M.R., after referring to the terms of the lease of January 13, 1882, and reading the letters of March 22, 1905, continued as follows:—The application before the learned judge was an application to stay proceedings in the action under the Arbitration Act, 1889, on the ground that the terms upon which the mine and way-leave were held after Lady Day, 1905, included the arbitration clause which is to be found in the lease itself. Neville J. refused the application, and held that in respect of all matters during the tenancy at will the arbitration clause and, as I read his judgment, all the other provisions of the lease must be disregarded, although, of course, in considering what ought to be paid for use and occupation, the royalty payable under the lease would be put in evidence, and might or might not form the basis of the judgment so far as that point was concerned. With great respect to the learned judge I am unable to take the view which he took of the relation between the parties. We are not dealing here with a situation from which we have to spell out a tenancy at will. We have here, what does not very often occur, an express tenancy at will created by written documents. We have to ascertain as best we can what are the terms of the tenancy at will so created. I think that question may be answered from several circumstances. Speaking for myself, I should be disposed to say that there is enough on the fair construction of the two letters of March 22, 1905, to shew what the terms of the tenancy were. I think that the answer to the request for an extension of the lease on the present terms until September 29 next—that is, for half a year—though it was not an acceptance in full in the sense that the lessees were to be tenants of this mine for an additional six months, was an acceptance in the sense that they were to continue to hold on the same terms as a precarious, and probably a very short, temporary arrangement until a new and final

(1) (1891) 60 L. J. (Q. B.) 640.

(2) [1892] 1 Q. B. 144.

arrangement could be arrived at. If that be the true view of the construction of these letters we have nothing to do with the authorities which have been referred to or with the interesting arguments which have been addressed to us. But I think that the matter may be looked at in another way. Apart from these two letters, what was the situation of the parties in reference to this mine and this way-leave in this lease? In the first place, although they were tenants at will, it is plain that they were something more than tenants at will, as was admitted in argument, otherwise they would not have been able to work the coal. Therefore the lessees were to be tenants at will with a right to get the coal and a right to exercise the way-leave. Both the mine and the way-leave are mentioned, and it seems to me irrational to suppose that the parties could have had any other meaning than that they should have the same mutual rights as before except in so far as you can find any stipulation in the old lease which is not applicable to a tenancy at will. Now there is ample authority that a tenant holding over after the expiration of a lease, if he pays rent or agrees to pay rent subsequently, becomes, if no other terms are suggested, a tenant from year to year—a yearly tenant; and there is ample authority that under those circumstances the tenant holding over is deemed to hold upon all the terms and conditions of the original tenancy so far as they are applicable to a yearly tenancy; and I can see no principle which can limit that position to a case where the tenancy is by matters subsequently occurring fixed in the sense that it is for a definite period. We know here exactly what the bargain between the parties was. It was to be a tenancy at will. We do not want to imply that; we know that by express contract; and, there being no authority in the books to negative that which seems to me on principle to be the true view, I am prepared to hold that where you find an express tenancy at will created on the termination of a lease, the same principle ought to be applied as would apply if you had a subsequent agreement to pay either the original rent or an increased rent—that is to say, all the terms and conditions of the original lease apply so far as they are consistent with such tenancy. It is important to observe that the lessees were rightfully there; they were rightly working

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the mine for the sake of both landlord and tenant, and hopeless difficulties would arise if neither party could tell whether the old relationship between them did or did not apply. With great respect to the learned judge, I think that he did not take the right view of this case, and that the provisions of the lease, including the arbitration clause, applied during the continuance of the tenancy at will.

Perhaps I ought to add this. A point was suggested under the Arbitration Act, 1889, namely, that there was no submission in writing. But the letter of March 22 headed "Little Wyrley Colliery Lease," signed by Mr. Chinn, whom I must treat as having signed as agent for all the lessors, seems to me, according to its true construction, to be an offer to the tenants to continue as tenants at will of the mine and way-leave upon the terms of the written document, namely, the lease which is mentioned. That is the offer which is accepted here, and therefore I think that that objection ought not to prevail.

SIR GORELL BARNES, PRESIDENT, and BUCKLEY L.J., in concurring, based their judgments entirely upon the construction of the letters.

[By consent the whole of the matters in dispute in the action were referred to arbitration.]

Solicitors: *Mackrell, Maton, Godlee & Quincey, for Wragge, Holliday, Godlee, Barrow & Horton, Birmingham; Nelson & Son, for H. S. Chinn & Son, Lichfield.*

H. B. H.

In re JEROME.

C. A.

1907

May 8.

Practice—Appeal—Leave—Interlocutory or Final Order—Solicitor and Client—Costs—Taxation—Summons to Review—Refusal—Judicature (Procedure) Act, 1894 (57 & 58 Vict. c. 16), s. 1.

An order dismissing a summons to review the taxation of a solicitor's bill of costs under the Solicitors Act, 1843, is not final, but interlocutory, and leave to appeal from such an order is necessary under s. 1 of the Judicature (Procedure) Act, 1894.

THIS was an appeal from the dismissal by Kekewich J. of a summons to review the taxation of a mortgagee's solicitor's bill of costs.

On January 31, 1906, the appellant, who was the mortgagor in the transaction, obtained an order of course, under s. 38 of the Solicitors Act, 1843, to tax the bill of costs which had been delivered by the mortgagee's solicitor. The order contained the usual direction for the payment of the amount certified to be due. The taxing Master having practically allowed the bill in full, formal objections to the taxation were delivered by the appellant. These were disallowed by the taxing Master, who certified the amount due to the solicitor. The appellant then took out a summons to review the taxation, which Kekewich J. dismissed with costs. The client appealed.

Jessel, K.C., and *Martelli*, for the appellant.

P. O. Lawrence, K.C., and *Rowlands*, for the respondent. This is an interlocutory order, and no leave to appeal has been obtained, as required by s. 1 of the Judicature Act, 1894. The question is whether a refusal to grant an application to review the taxation of a solicitor's bill of costs is final or interlocutory. In a sense, of course, every refusal is final. If an application is interlocutory, its refusal cannot be a final order. The final order in this proceeding is the order for taxation and payment: *In re Herbert Reeves & Co.* (1) [They also referred to *In re*

(1) [1902] 1 Ch. 29.

C. A. *Watson* (1); *In re Croasdell and Cammell, Laird & Co.* (2); *Bozson v. Altrincham Urban Council* (3); *Ex parte Stevenson* (4); *In re Furber* (5); *Standard Discount Co. v. Otard de la Grange.* (6)
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 They were stopped by the Court.]

Jessel, K.C. In *Bozson v. Altrincham Urban Council* (3) Lord Alverstone C.J. says that the test is whether the judgment or order, as made, finally disposes of the rights of the parties. If it does, it is a final order; but if not, it is interlocutory. Applying that test here, the sole point in issue is what the client has to pay, and the refusal of the application to review determined that issue. There will be no other order on us to pay. The matter in dispute between the parties is therefore finally disposed of. *Shubrook v. Tufnell* (7) was followed in the last-mentioned case. In *Salaman v. Warner* (8) a different test was laid down, viz., that an order is not final unless it is made on such an application or proceeding that, for whichever side the decision is given, it will, if it stands, finally determine the matter in litigation. If that is to be followed, then my contention is wrong, but the Court of Appeal declined to follow that in *Bozson v. Altrincham Urban Council.* (3) In *In re Herbert Reeves & Co.* (9) it was held that an order dismissing a summons for delivery of a bill and taxation was final. When the order for delivery was refused there was an end of the matter. There may be more than one final order in a proceeding. This order finally disposes of the rights of the parties, and is therefore a final order. In the alternative we ask now as an indulgence for leave to appeal.

COZENS-HARDY M.R. We will not trouble you, Mr. Lawrence. The question as to what order is interlocutory and what is final is undoubtedly one of very great difficulty. It is not very long ago, in fact only last July, that the full Court of Appeal was summoned with a view to laying down some definite pronouncement or rule on that point: *In re Croasdell and Cammell, Laird & Co.* (2) My immediate predecessor (now Lord Collins) there

(1) (1887) 19 Q. B. D. 234.

(2) [1906] 2 K. B. 569, 573.

(3) [1903] 1 K. B. 547.

(4) [1892] 1 Q. B. 609.

(5) (1898) 43 Sol. J. 65.

(6) (1877) 3 C. P. D. 67.

(7) (1882) 9 Q. B. D. 621.

(8) [1891] 1 Q. B. 734.

(9) [1902] 1 Ch. 29.

said this: "As regards the enunciation of any general rule on the question what orders are final and what are interlocutory, that is a matter which it might be our own duty to undertake but for the fact that it is one which falls within the jurisdiction of the Rule Committee, and under the circumstances it appears to me that it would be more desirable that it should be dealt with by that committee than in a case for the purposes of which it is not necessary to lay down such a rule; and I therefore refrain from going further into the cases or endeavouring to formulate a fresh rule on the subject." I certainly propose to follow in the steps of my immediate predecessor, and I do not propose to lay down any general rule; but in the present case it does seem to me that the order under review is an interlocutory order. An order of course was made under s. 38 of the Solicitors Act, the mortgagor having sought to tax a bill of costs delivered by the mortgagee's solicitor. The order was in common form for taxation of the bill and for payment of what should be found due on the result of the taxation. That is the only order for payment. No other order could be made, and when the taxing Master's certificate is finally made execution can be issued under that order, and no further order will be required. Now it was held by this Court in *In re Herbert Reeves & Co.* (1) that what I call the order of course was a final order. It is true that in that case the solicitors objected to deliver a bill at all, and the application was for delivery of the bill and for taxation. Here a bill had been delivered to the mortgagee, but whether it had been paid by the mortgagee is not material. The order here was an order of course, simply for payment of the amount which should be found due on taxation; and it seems to me that the view taken by the Court in *In re Herbert Reeves & Co.* (1) must prevail in this case, and that this order of course is none the less a final order because it does not prescribe the exact amount for which execution can be issued. But then it is said that you cannot ascertain the amount which is ultimately due until you get rid of this summons to vary the certificate. There may be many summonses or applications in the course of a proceeding of this kind, and I should shrink from holding that the order made on

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each one of them is a final order within the meaning of the Act, or even that the last in point of time is to be described as a final order. In my opinion it is not inconsistent with any of the authorities to hold that the order made upon an application of this kind to review the taxing Master's certificate is an interlocutory order although the Court did not accede to the application. I think, therefore, this is a case in which no appeal lies without leave.

SIR GORELL BARNES, PRESIDENT. I agree, and I must say that it would be deplorable if we had to come to a different conclusion, because, this being a refusal to review a taxation, it would follow that every objection which resulted in a refusal to review, involving, it may be, the most trumpery amount, might be brought by way of right to this Court. It seems to me a satisfactory conclusion to leave such things to the discretion of the judge or the Court of Appeal, whereby any matter of substance can be dealt with by leave while applications of a trumpery kind can be stopped.

KENNEDY L.J. I am also of opinion that the objection that has been taken by the respondent's counsel is a good one.

[Their Lordships also refused to grant leave to appeal, and dismissed the appeal with costs.]

Solicitors: *Grover, Humphreys & Son; W. S. Jerome.*

G. A. S.

In re BETTS.
DOUGHTY *v.* WALKER.

[1906 B. 1608.]

KEKEWICH
J.
1907
April 18.

Practice — Costs — Administration — “Testamentary Expenses” — Will — Direction to pay out of Personal Estate—Real Estate—Inquiry as to Heir-at-law—Incidence of Costs—Land Transfer Act, 1897 (61 & 62 Vict. c. 65), s. 1, sub-s. 1; s. 2, sub-ss. 1, 2, 3; s. 3, sub-s. 1—Rules of Supreme Court, Order LV., r. 4A.

Testatrix died intestate as to her real estate, having by her will directed that her testamentary expenses should be paid out of her personal estate:—

Held that, although the effect of the Land Transfer Act, 1897, Part I., has been to make the costs of administering real estate testamentary expenses, the ordinary practice of the Chancery Division (that the costs of administration, so far as they have been increased by the administration of the real estate, shall be borne by that real estate) is nevertheless still applicable, and accordingly the costs of the inquiry as to the testatrix's heir at law must be borne by the realty, notwithstanding the general direction contained in the will that the testamentary expenses were to be paid out of the personalty.

Patching v. Barnett, (1881) 51 L. J. (Ch.) 74 (note, *post*, p. 154), discussed and followed.

In re Jones, [1902] 1 Ch. 92, followed.

If a testator intends that the costs of administering his real estate shall be borne by his personal estate, the will must contain a specific direction to that effect.

ADJOURNED SUMMONS.

By her will dated October 23, 1883, Katherine Harriet Betts, the testatrix, after bequeathing a certain annuity which she charged on her real estate, gave and devised all her real estate unto and to the use of her brother-in-law R. B. Chichester, his heirs and assigns, and, subject to the payment of her just debts and funeral and testamentary expenses, she bequeathed all her personal estate unto R. B. Chichester absolutely; and she appointed R. B. Chichester and D. C. Warnes executors of her will.

R. B. Chichester died in the lifetime of the testatrix.

KEKEWICH J. The testatrix died on December 18, 1904, without leaving any near relatives surviving her.

1907 D. C. Warnes renounced probate of her will, and on April 2, 1906, letters of administration with the will annexed were granted to the plaintiff, a cousin-german and one of her next of kin.

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DOUGHTY v. WALKER. The testatrix's personal estate was valued at 7080*l.* 6*s.* 7*d.*, and her real estate at 4893*l.* 14*s.* 7*d.*

In consequence of the death of R. B. Chichester in her lifetime the testatrix died intestate as to her real estate, and Sir Baldwin Wake Walker, Bart., claimed to be her heir-at-law, tracing his claim through a common ancestor who died in 1733, and who was the great-great-grandfather of the testatrix. Sir B. W. Walker died on June 28, 1905, and on October 19, 1905, probate of his will was granted to his widow, the defendant Dame Fanny Augusta Cowper Walker, as his executrix and devisee.

On April 28, 1906, the plaintiff took out a summons against the defendant for an inquiry as to the heir-at-law of the testatrix, and on June 20, 1906, the usual order for an inquiry was made.

The inquiry was lengthy and complicated, and entailed considerable expense, but ultimately the Master certified that Sir B. W. Walker was heir-at-law of the testatrix at the time of her death, and that the defendant was, as executrix of his will and devisee, entitled to such real estate of the testatrix as descended to her heir-at-law.

The defendant thereupon took out this summons in the action asking for a declaration of her title in accordance with the finding of the Master's certificate, and that the taxed costs of and incidental to this action might be paid as testamentary expenses by the plaintiff out of the personal estate of the testatrix.

Ashworth James, for the defendant. The ratio decidendi of the cases which decide that estate duty on real estate is not a testamentary expense, namely, that it is not necessary for the executor to pay estate duty in order to obtain probate, does not apply here, because there are expenses which fall on the administrator by virtue of his duty as administrator. But for sub-ss. 2 and 3 of s. 2 of the Land Transfer Act, 1897, this

application would not have been made. If this came under the ordinary rule in *Patching v. Barnett* (1), the expenses so far as they had been increased by the real estate would have to be borne by the real estate; but the will says that testamentary expenses are to be paid out of personal estate, and these are expenses incurred by the administrator because he is administrator, and are testamentary expenses as the law now stands, and payable out of personalty.

P. O. Lawrence, K.C., and *Hodge*, for the plaintiff. This summons is taken out under Order LV., r. 4A, which is a rule framed for the purposes of the Land Transfer Act, 1897, and the question is whether, under the ordinary rule stated in *Patching v. Barnett* (1), the costs of administering the real estate are to be thrown on the real estate. We submit that they are, for the practice of the Court has not been affected by the Land Transfer Act, 1897: *In re Jones*. (2) This will is dated in 1883, and at that date the phrase "testamentary expenses" could not have included administration of the real estate, and, even if it had, the rule in *Patching v. Barnett* (1) would still have applied, for in both that case and this there is a direction in the will that the testamentary expenses are to be paid out of the personal estate. Under the proviso in s. 2, sub-s. 3, of the Act the Court is not driven to do what would obviously work an injustice in this case.

Ashworth James, in reply. At the date of *Patching v. Barnett* (1) the real estate did not vest in the executor at all, and therefore "testamentary expenses" was a much narrower term then than now, and the costs of real estate were quite outside the purview of the phrase, the use of which in that case throws no light on this case. Sect. 2, sub-s. 2, clearly makes the expenses of dealing with real estate "testamentary expenses," only by sub-s. 3 the incidence of the costs remains the same as before, unless there is a direction to the contrary. If the will is silent on the question, the old rule in *Patching v. Barnett* (1) prevails: *In re Jones* (2); but where the will contains a direction that they are to be paid out of personal estate, they all fall on the personal estate. Sect. 24 of the Wills Act disposes of the

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(1) 51 L. J. (Ch.) 74 (see note at end of this report, p. 154).

(2) [1902] 1 Ch. 92.

KEKEWICH argument that this will was made before the Land Transfer Act, 1897.

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KEKEWICH J. But for the case of *Patching v. Barnett* (1) I might have held that the testamentary expenses here in question ought to be borne by the personal estate. There is, on the face of the will, a clear direction to that effect. The testatrix devised her real estate to her brother-in-law, who predeceased her, and so the devise could not take effect. After the devise she goes on to say, "and subject to the payment of my just debts, funeral and testamentary expenses, I bequeath all my personal estate to " the same brother-in-law. There certainly would have been some reason for holding that the testatrix intended that all the testamentary expenses, whatever they were, as well as debts and funeral expenses, should be paid out of the personal estate, and not out of the real estate, and, but for the decision to which I have referred, I might also have not unreasonably held that the express direction by the testatrix overrode the ordinary rule. About the ordinary rule, apart from any direction in the will, there has not been any doubt for some time past. The rule is that the costs of an administration action ought to be distributed fairly among the different subjects of the administration, and that if the administration extends to real and personal estate, then, in some way, the costs ought to be distributed between the real and personal estate, the costs attributable to the real estate being borne by the real estate. That is recognized by Sir George Jessel M.R. in giving judgment in the case of *Patching v. Barnett* (1), and assented to by the other members of the Court of Appeal. But the force of the decision, so far as this case is concerned, is that there the testator did give precisely such a direction as the testatrix has given here. In that case the testator directed payment of his debts and funeral and testamentary expenses by his executrix out of his personal estate not specifically bequeathed. So that there was a specific direction in that will to pay all the testamentary expenses out of the personal estate, and the point was not merely taken, but argued, on behalf of the persons claiming under the heir, and counsel

(1) 51 L. J. (Ch.) 74 (see note at end of this report, p. 154).

relied on the particular direction. Though I do not clearly see that Sir George Jessel M.R. said in so many words that the rule could not be overridden by the specific direction, still he stated the general rule as applicable, and it is quite impossible, of course, for him not to have had before him at the moment the direction and the argument founded on it. The decision, therefore, really amounts to this, that, notwithstanding such a direction, the ordinary rule must apply. I suppose there might be a direction to override it, but what I take the meaning of the decision to be is that the direction must be so plain as to shew that the testator intended to depart from the general rule, otherwise when he says that the testamentary expenses are to be borne by the personal estate he only means such part of the testamentary expenses as in the ordinary course would be borne by the personal estate, and does not mean to defeat the rule of Court that in an administration action there is to be a fair distribution between the real and personal estate.

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Now, are the costs of this inquiry and what has been done here a testamentary expense? They might not have been before the Land Transfer Act of 1897; but to my mind they clearly are now. The administrator here had the real estate vested in him: there was a lapse; the devisee died in the lifetime of the testatrix; and it was impossible for the administrator to ascertain to whom he ought to convey without finding who was entitled as heir-at-law, and the expenses so incurred seem to me to be clearly testamentary expenses. But, though they may be so, I think the Act does not otherwise assist the heir, because it is plainly decided by Buckley J. in the case of *In re Jones* (1) that no variation of the rules has been produced by the provisions of the Act.

Then the only question which arises is whether the whole of these costs ought to be thrown on the real estate. I have used words hitherto which leave that question open. The way the Court has thought right to ascertain what is a fair proportion is that the costs of the general administration, so far as they have been increased by including the real estate, are thrown on that real estate, the rest will be thrown on the personal estate.

(1) [1902] 1 Ch. 92.

KEKEWICH J. The Court, as pointed out by Sir George Jessel M.R., roughly ascertains what the proportion of costs is; but here all the proceedings have been in respect of the real estate, and the personal estate is not affected at all.

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The result is that the general costs of the administration would, however incurred, have been increased to the extent of this particular inquiry. Therefore all the costs of these proceedings must fall on the real estate.

Solicitors: *Williams & James; Morris & Bristow, for Lawton, Warnes & Sons, Eye, Suffolk.*

R. M.

NOTE.

PATCHING *v.* BARNETT.

[1873 P. 97.]

C. A.
1881
June 28.
—

Appeal from the decision of Malins V.-C. upon several questions which had arisen on the further consideration of the above-mentioned suit for the execution of the trusts of the will and codicils of the testator Richard Clemson Barnett, who died in May, 1858, and for the administration of his real and personal estate.

The bill was filed on May 29, 1873, against the testator's legal personal representative, by the plaintiff, John Patching, who was entitled to a share of the residuary personal estate of the testator, and was also entitled as one of the residuary devisees of the testator's heir-at-law in the event of the testator's having died intestate in respect of his real estate.

The Vice-Chancellor had held, *inter alia*, (1.) that the trusts of the real estate beyond the period of twenty-one years from the death of the testator's widow were void for remoteness; (2.) that the gift of a bust of Oliver Cromwell had not lapsed; and (3.) that an annuity charged on specifically mentioned real estate was payable primarily out of the personal estate. The costs of the administration had been very considerable, and the Vice-Chancellor, after argument, had decided that they should be borne in moieties by the real and personal estate. The value of the real estate was about 100,000*l.*, and of the personal estate about 30,000*l.*

There was an appeal from the decision of the Vice-Chancellor on each of the three questions above mentioned, and also a cross notice upon the first appeal with regard to the apportionment and incidence of the costs of the suit.

On the first appeal the Court affirmed the Vice-Chancellor's decision that the trusts of the real estate were void for remoteness, but on the second and third appeals the Court reversed his decision. The cross notice relating to

costs and the argument and judgments thereon are alone material for the purposes of this report. KEKEWICH J.

By his will the testator had directed as follows:—"And I direct that all my just debts and funeral and testamentary expenses shall be paid and satisfied as soon as conveniently can be after my death by my executrix out of my personal estate not specifically bequeathed."

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Millar, Q.C., and *Kingdon*, for devisees of the heir-at-law. This is a cross notice upon the first appeal with regard to the costs of the action. Our objection is that the costs of the action ought to come out of the personal estate. They have been large, and a considerable amount of the costs has been occasioned in respect of the real estate, and the question is whether the rule of the Court is that there should be an apportionment. The Court has not infrequently in a case, such as this for example, where costs have been incurred in the construction of a will both as to realty and personalty made the personalty bear the costs of the construction of the will even with regard to the realty: *Pickford v. Brown* (1); *Ripley v. Moysey* (2); *In re Middleton*. (3)

[JESSEL M.R. That is not the practice of the Court now. The costs of administering the real estate are never thrown on the personal estate.]

There is another point. The testator has directed his testamentary expenses to be paid out of his personal estate not specifically bequeathed. According to the modern decisions, testamentary expenses include the costs of an administration suit; and we ask the Court to say that, whatever may be the general rule, the costs of this suit are, by virtue of the testator's express direction, to be borne by the personal estate.

[JESSEL M.R. It does not follow that the real estate should not bear part of the costs of the suit. Take the case, for instance, where the real estate has been sold. It does not mean that. Testamentary expenses, I suppose, do not include the costs of the real estate.]

They include the costs of the administration: *In re Young, Young v. Dolman*. (4)

[JESSEL M.R. Why? Taking the accounts of the personal estate is of course what the executors have something to do with. I am quite clear that the Court had a right to throw part of these costs upon the real estate. Is the testator's legal personal representative before the Court?]

No, he has not been served, with notice of this appeal, but the persons beneficially entitled to the personal estate are before the Court.

J. Pearson, Q.C., and *Currey* for the appellant.

Glasse, Q.C., and *J. M. Lloyd* for the plaintiff.

Bristowe, Q.C., and *Ingle Joyce* for the trustees.

Higgins, Q.C., and *Coltman*; *Latham*; and *Onslow* for other parties having liberty to attend.

SIR G. JESSEL M.R. I think it important to say that in the administration of real and personal estate the modern rule is that the costs exclusively

(1) (1856) 2 K. & J. 426.

reported 19 Ch. D. 552.

(2) (1836) 1 Keen, 578.

(4) (1880) 25 Sol. J. 48; afterwards

(3) [1881] W N. 93; afterwards

reported 44 L. T. 499.

KEKEWICH J.
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occasioned by the administration of the real estate are thrown upon the real estate. The general costs of the suit are borne by the personal estate, but what I will call the increased costs arising from administering the real estate are, as a rule, thrown upon the real estate; and the Courts have been in the habit for several years past of apportioning those costs at the hearing, instead of throwing upon the taxing Master the very difficult task of ascertaining how much of each bill of costs brought in by the solicitors has been occasioned exclusively by the real estate administration, and how much by the personal estate administration. That rule has been found to be very convenient and to save great cost, delay, and difficulty in the taxing office. The judge, as a rule, knows more about the suit and is better able to apportion the costs, to say nothing of his superior knowledge of law, than the taxing Master; and it has been my habit for years past, whenever requested to do so, to apportion the costs, and to give some aliquot sum which is, to the best of my judgment, a fair proportion to be paid. That seems to have been the course adopted by the Vice-Chancellor in this case. I have not the materials before me to say whether his apportionment is the apportionment I myself should have made, nor do I require them, because in a case of this kind, unless there is some very gross miscarriage, I think it would not be right on the part of the Appeal Court to interfere with the discretion of the judge in the Court below in the apportionment of the costs. It appears to me, therefore, quite independently of the technical objection that the legal personal representative has not been served with notice of this appeal, that this appeal should not be allowed. But as we give the costs of the others out of the estate I think it is fair to mete out the same measure of justice here.

BAGGALLAY L.J. I entirely agree with what has fallen from the Master of the Rolls. I wish merely to add, what perhaps he has already substantially stated, that where it is once clear that it is a case where the real estate should bear a portion of the costs of the action, and where the judge in the Court below, from which the appeal is brought, has, in the exercise of his discretion, made a particular apportionment, that discretion should not be interfered with by the Court of Appeal, except in some very clear case where there has been a misconception in the substance of the case.

LUSH L.J. I am of the same opinion.

Solicitors: *Palmer & Bull; Senior, Attree & Johnson, for Hunt, Currey & Nicholson, Lewes; R. Ballard; Wing & Du Cane; E. Mirams; C. D. Jones.*

R. M.

IDEAL BEDDING COMPANY, LIMITED v. HOLLAND. KEKEWICH J.

[1906 I. 589.]

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Fraudulent Conveyance—Post-nuptial Settlement—Intention to “delay, hinder, or defraud Creditors”—13 Eliz. c. 5—*Equitable Reversionary Interest in Personal Estate—Stocks and Shares—Judgment Creditor—Charging Order—Judgments Act, 1838 (1 & 2 Vict. c. 110), s. 14—Appointment of Receiver—Equitable Execution—Injunction—Settlement Set Aside—Honest Trustee—Costs out of Settled Fund—Possibility of Surplus—Form of Order.* March 23;
April 11, 24.

A voluntary settlement in favour of his wife and child by an insolvent settlor of his equitable reversionary interest in personal estate comprising stocks and shares not subject to an imperative trust for sale:—

Held void, under 13 Eliz. c. 5, as against the creditors of the settlor, on the ground that it “delayed, hindered, or defrauded” the plaintiffs, who were judgment creditors suing on behalf of themselves and all other creditors, from obtaining either—

(1.) A charging order upon the stocks and shares under s. 14 of the Judgments Act, 1838.

South Western Loan and Discount Co. v. Robertson, (1881) 8 Q. B. D. 17, and *Bolland v. Young*, [1904] 2 K. B. 824, followed.

Quære whether *Dixon v. Wrench*, (1869) L. R. 4 Ex. 154, is now law.

Or, (2.) The advantage of the appointment of a receiver, by way of equitable execution, of the debtor's reversionary interest, which would have operated as an injunction to restrain the debtor from himself receiving the property.

Tyrrell v. Painton, [1895] 1 Q. B. 202, followed.

Semle, that, having appointed a receiver at the instance of the judgment creditor, the Court would not stop short of granting whatever injunction was necessary to prevent the debtor's property from being received by his assignee to the prejudice of the judgment creditor.

In re Marquis of Anglesey, [1903] 2 Ch. 727, adopted.

The trustee, who, with knowledge of the settlor's destitution, prepared the settlement in question, but who acted in good faith and afterwards appeared at the trial to defend the settlement:—

Held entitled to his costs out of the settled property.

Where there is any possibility of a surplus after payment of the creditors, the proper form of order after declaring the settlement void as against them is, not to direct the settlement to be delivered up to be cancelled, but to direct the trustees to join and concur in all acts and things necessary for making the property comprised in the settlement available for satisfying the claims of the creditors.

WITNESS ACTION.

The plaintiffs were a company incorporated under the laws of the Dominion of Canada, and they sued on behalf of themselves

KEKEWICH J. and all other the unsatisfied creditors of the defendant Christopher Holland.

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In November, 1905, the plaintiffs discovered that the defendant C. Holland, who was in their employment as book-keeper and cashier, had appropriated to his own use the amount of \$13,802.20 (equivalent to 2875*l.* 8*s.* 4*d.*) of their moneys. These defalcations were acknowledged by him in writing under his hand and seal on December 27, 1905.

On February 2, 1906, the defendant C. Holland was arrested at Bristol, England, and lodged in Brixton Prison pending the necessary investigation and order for his return to Toronto under the provisions of the Fugitive Offenders Act, 1881, which order was made on March 16, 1906.

While under remand and detained in Brixton Prison the defendant C. Holland executed the post-nuptial deed of settlement of February 13, 1906, hereinafter mentioned, of the reversionary interest to which he was entitled under the will dated January 29, 1901, of his father, John Holland, who died on December 19, 1905. By the will in question the testator directed payment of his just debts, funeral and testamentary expenses, and amongst other bequests gave a legacy of 500*l.* to his son the defendant C. Holland, and devised and bequeathed to his executors and trustees therein named all his real estate and the residue of his personal estate upon trust for sale and conversion, and for investment of the proceeds of sale, with power to reinvest or alter any of his existing securities and upon trust to pay the annual income on the sum of 9000*l.*, part thereof, to his wife, Elizabeth Holland, during widowhood, or if she should marry again then to pay to her the interest of 4000*l.* part thereof, during the remainder of her life, and upon such second marriage the testator directed that the sum of 5000*l.*, the residue of the sum of 9000*l.*, should then be paid and divided between his two sons, as to 4000*l.* to his son C. H. Holland and as to 1000*l.* to his son the defendant C. Holland; and upon the decease of his wife the testator directed the sum of 9000*l.* or 4000*l.* (as the case might be) to be divided between his two sons, as to two-thirds thereof to C. H. Holland and as to the remaining one-third to the defendant C. Holland; and as to all the residue of

his real and personal estate the testator devised and bequeathed the same to his trustees to be divided equally between his two sons, C. H. Holland and the defendant C. Holland; and the testator appointed Joseph Barkla and John Beames Cooper Burroughs to be the executors and trustees of his will.

The legacy of 500*l.* was paid to the defendant C. Holland while he was detained in Brixton Prison.

By the above-mentioned settlement dated February 13, 1906, and made between the defendant C. Holland of the one part and the defendants R. A. Sly and A. St. J. Burroughs (therein called the said trustees) of the other part; after recitals of the will and death of John Holland and the desire of the defendant C. Holland to make provision for his wife, the defendant Alice Marguerite Holland, and his issue, and to settle his reversionary shares under the will, the defendant C. Holland, in consideration of his natural love and affection for his said wife and issue, assigned all the share or shares, estates or interests, whether vested or contingent, to which under the will he would become entitled in reversion expectant as aforesaid, unto the said trustees upon trust to require the transfer or payment thereof to them when and so soon as the same should fall into possession, and to hold the said part or share and the investments representing the same in trust to pay the income thereof to the defendant Alice Marguerite Holland for her life, and after her death to stand possessed of the trust funds in trust for his issue as therein mentioned, with an ultimate trust for the defendant C. Holland absolutely.

This settlement was prepared by the defendant Burroughs, who, at the instance of the defendant Sly, visited the defendant C. Holland in Brixton Prison, and took instructions for the settlement from the defendant C. Holland, who stated that he had given the plaintiffs security for the debt in the shape of a bill of sale and assignment of policies on his life. The settlement was accordingly prepared and subsequently executed.

The infant defendant, Christopher Arthur Mancklin Holland, was four years of age, and was the only child of the defendants C. Holland and A. M. Holland.

The testator's widow, Elizabeth Holland, was still living.

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By an agreement under seal dated March 30, 1906, and expressed to be made between the defendant C. Holland of the first part, the defendant Alice M. Holland of the second part, and the defendants R. A. Sly and A. St. J. Burroughs of the third part, and the plaintiffs of the fourth part, and executed by the defendants C. Holland and Sly and the plaintiffs, it was agreed (*inter alia*) that the defendants C. Holland and A. M. Holland should consent to judgment in an action to be brought in the Chancery Division for a declaration that the above-mentioned settlement was void, and that the trustees, the defendants Sly and Burroughs, would not resist such proceedings, and that the plaintiffs were to abandon all claim to one moiety of the 500*l.* legacy and to the other moiety upon judgment being obtained in the intended Chancery action.

The defendant Burroughs refused to execute this agreement.

On March 31, 1906, the plaintiffs recovered judgment in an action in the King's Bench Division of the High Court of Justice against the defendant C. Holland for 2875*l.* 8*s.* 4*d.*, being the amount of the money belonging to the plaintiffs appropriated by the defendant to his own use, and 8*l.* costs.

On April 2, 1906, the plaintiffs issued the writ in this action, and in their statement of claim alleged that the settlement was fraudulent, and made by the defendant C. Holland to delay, hinder, and defraud his creditors; that it was not made for valuable consideration; that the defendant C. Holland had no property or means other than the legacy and reversionary interest under the said will, and was insolvent at the date of the execution of the settlement: and the plaintiffs claimed (1.) a declaration that the settlement was void as against the plaintiffs and the other creditors of the defendant C. Holland, and (2.) that the defendants A. Sly and A. St. J. Burroughs might be ordered to join and concur in all acts and things necessary for making the property comprised in the settlement available for satisfying the claim of the plaintiffs and all other the creditors of the defendant C. Holland.

The defendants Sly and Burroughs alone delivered a defence, by which they admitted the settlement and pleaded that at the

date of the settlement they were informed and believed that the plaintiffs had taken from the defendant C. Holland a policy or policies on his life and a bill of sale upon his furniture in Ontario as security for moneys due from him to the plaintiffs, and that the plaintiffs were then proceeding criminally against him, and that he was desirous of settling his reversionary interests under his father's will, and it was under those circumstances that these defendants became trustees of the settlement.

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Subsequently the defendant Sly severed and appointed separate solicitors, but he was not represented at the trial.

At the date of the trial the testator's residuary trust estate consisted mainly of Taff Vale Railway preference stock, Colonial Inscribed stocks, a mortgage on real estate, and cash at the bank, the total value amounting to 5600*l.* or thereabouts.

It was proved at the trial that, at the date of the execution of the settlement, there were other unsatisfied creditors of the defendant C. Holland, besides the plaintiffs.

As the result of the evidence at the trial Kekewich J. held that the insolvency of the defendant C. Holland at the date of the settlement was sufficiently proved, and that the circumstances under which the settlement was executed were such as to render it obnoxious to the statute 13 Eliz. c. 5, if, having regard to the provisions of that statute and to the property purporting to be conveyed, the settlement ought to rank as one made to delay, hinder, or defraud creditors.

The case now came on for further argument upon the question of law so raised.

Stewart-Smith, K.C., and *Howard Wright*, for the plaintiffs. The plaintiffs are hindered and delayed by this settlement in two ways: In the first place, it prevents them from obtaining equitable execution by the appointment of a receiver of the debtor's reversionary interest; and, secondly, the debtor has such an interest in the investments as would enable the plaintiffs to get a charging order if they were not defeated by the settlement. We submit that anything which tends to delay, defraud, hinder, or disturb a creditor in his action, or any step in the action, is

KEKEWICH sufficient to come within the operation of the statute 13 Eliz.

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First, with regard to the question of equitable execution, the Court has jurisdiction to appoint a receiver of an equitable reversionary interest in personal estate, and, although the appointment does not create a charge, it will operate as an injunction to restrain the debtor from himself receiving the proceeds of sale: *Tyrrell v. Painton* (2), and how useful the appointment may prove is shewn by *Levasseur v. Mason & Barry, Ltd.* (3), and the effect of such an appointment was carried still further by Swinfen Eady J. in *In re Marquis of*

(1) 13 Eliz. c. 5, provides:—

“For the avoiding and abolishing of feigned, covinous and fraudulent feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments and executions, as well of lands and tenements, as of goods and chattels, more commonly used and practised in these days than hath been seen or heard of heretofore: which feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments and executions, have been and are devised and contrived of malice, fraud, covin, collusion or guile, to the end, purpose and intent, to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries and reliefs, not only to the let or hindrance of the due course and execution of law and justice, but also to the overthrow of all true and plain dealing, bargaining, and chevisance between man and man, without the which no commonwealth or civil society can be maintained or continued.

“2. Be it therefore declared, ordained and enacted, that all and every feoffment, gift, grant, alienation, bargain and conveyance of

lands, tenements, hereditaments, goods and chattels, or of any of them, or of any lease, rent, common, or other profit or charge out of the same lands, tenements, hereditaments, goods and chattels, or any of them, by writing or otherwise, and all and every bond, suit, judgment and execution, at any time had or made sithence the beginning of the queen's majesty's reign that now is, or at any time hereafter to be had or made, to or for any intent or purpose before declared and expressed, shall be from henceforth deemed and taken (only as against that person or persons, his or their heirs, successors, executors, administrators and assigns, and every of them, whose actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries and reliefs, by such guileful, covinous or fraudulent devices and practices, as is aforesaid, are, shall or might be in any wise disturbed, hindered, delayed or defrauded) to be clearly and utterly void, frustrate, and of none effect; any pretence, colour, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding.”

(2) [1895] 1 Q. B. 202.

(3) [1891] 2 Q. B. 73.

Anglesey (1), where the receiver took priority over subsequent judgment creditors who had obtained stop orders. Wherever facilities added by statute or given by the Court are hindered or delayed, the case is brought within the mischief of the statute: *Blenkinsopp v. Blenkinsopp*. (2) Equitable execution is a modern procedure, and among the earlier cases there is none in which a receiver was expressed to be appointed by way of equitable execution. The phrase, however, is used in Order L., r. 15A.

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Again, with regard to the question of a charging order, the plaintiffs could have obtained a charging order under the Judgments Act, 1838 (1 & 2 Vict. c. 110), s. 14, on the stock set aside to answer this legacy, if they had not been hindered by the settlement, and it does not matter that the stock is held for others as well as for the debtor: *South Western Loan and Discount Co. v. Robertson* (3); *Bolland v. Young*. (4) This case is distinguishable from *Dixon v. Wrench* (5), for in that case there was an imperative direction to convert. Here there is a separate legacy set aside, and there is power to convert and to vary investments, but, subject to that, the fund is to be invested in trustee securities and to be dealt with as a separate legacy, and we submit that the defendant Holland's interest in the trust fund could be reached by a charging order.

It is, moreover, not even necessary that a charging order should be obtained by the judgment creditor in order to bring the case within the statute 13 Eliz. c. 5: *Goldsmith v. Russell*. (6)

P. O. Lawrence, K.C., and *Ribton*, for the defendant Burroughs. It is the duty of the defendant trustee to uphold the settlement. The plaintiffs cannot say they are hindered within the meaning of 13 Eliz. c. 5, because there is no process known to the law by which they can get execution, and that is so, not by reason of the settlement, but because of the character of the property. They are not prejudiced, "inasmuch as this species of property" is "not subject to be taken in execution" within the reasoning of Lord Cottenham L.C. in *Norcutt v. Dodd* (7), referred to in

(1) [1903] 2 Ch. 727.

(4) [1904] 2 K. B. 824.

(2) (1852) 1 D. M. & G. 495,
500.

(5) L. R. 4 Ex. 154.

(6) (1855) 5 D. M. & G. 547.

(3) 8 Q. B. D. 17.

(7) (1841) Cr. & P. 100, 102.

KEKEWICH *Edmunds v. Edmunds*. (1) No doubt this property would be available in bankruptcy, but that is not the point; the question is, Can the creditors get equitable execution against this interest?

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As pointed out by Cotton L.J. in *In re Shephard* (2), equitable execution is really equitable relief, which is granted on the ground that there is no remedy by execution at law. Equitable execution was known long before the Judicature Acts, and is not such an execution as will give to the creditors a right to have such a settlement set aside as fraudulent. What is really causing the delay here is not the assignment by the settlement, but the prior life interest. The judgment creditor cannot obtain a charge on or a sale of a reversionary interest: *In re Potts* (3); *Flegg v. Prentis* (4); *De Peyrecave v. Nicholson* (5); *Tyrrell v. Painton* (6); *In re Marquis of Anglesey* (7); *Harris v. Beauchamp Brothers* (8); *Norcutt v. Dodd*. (9)

The result of the decision in *Tyrrell v. Painton* (6) is that a debtor remains able to deal with the reversionary interest notwithstanding the appointment of a receiver. Swinfen Eady J. in *In re Marquis of Anglesey* (7) is the first judge to suggest that the appointment of a receiver prevented the debtor from dealing with the moneys to the prejudice of the execution creditor, although he recognizes that a charge is not created. We submit that that is contrary to what Lindley L.J. said in *Tyrrell v. Painton*. (6) The appointment of a receiver does not create an interest in the fund: *In re Potts*. (3) Then, with regard to the charging order, the testator died in December, 1905, and we submit that on February 13, 1906, the date of the settlement, the only interest which the debtor had was an interest in the residuary real and personal estate after payment of debts, funeral and testamentary expenses, and investment of the residue; there was nothing which any creditors could attach in any sense.

(1) [1904] P. 362.

(2) (1889) 43 Ch. D. 131, 135.

(3) [1893] 1 Q. B. 648.

(4) [1892] 2 Ch. 428.

(5) (1894) 71 L. T. 255.

(6) [1895] 1 Q. B. 202.

(7) [1903] 2 Ch. 727.

(8) [1894] 1 Q. B. 801.

(9) Cr. & P. 100, 102.

There is no evidence that the present investments existed at the date of the settlement, or will exist at the death of the tenant for life. They came into existence after the date of the settlement, and we submit that at that date the debtor had no interest in any of those stocks under s. 14 of the Judgments Act, 1838, or s. 1 of the Judgments Act, 1840 (3 & 4 Vict. c. 82). There was an imperative trust for sale after payment of debts, &c., and there was no stock standing in his name. In *Bolland v. Young* (1) there was no trust for sale. The principle of *Dixon v. Wrench* (2) is applicable to this case rather than Stirling L.J.'s decision in *Bolland v. Young* (1), in which case there was no direction for division of capital, as here. The test is whether the judgment creditor has a right to have the property handed to him. An equitable interest in the proceeds of sale is not enough. There must be a right to have it in specie.

Gatey, for the infant defendant. The effect of the judgment in the King's Bench Division is to create a new debt, and merge the old one in the judgment: *Kendall v. Hamilton* (3); *Stileman v. Ashdown* (4); and, therefore, the plaintiffs are not now entitled to upset the settlement.

Stewart-Smith, K.C., in reply. It does not affect the question that the debt has merged in the judgment. The plaintiffs are and have always been creditors; their debt has become a debt of record. For the present purposes it makes no difference whether the plaintiffs' debt was before or subsequent to the settlement; if it was subsequent, the Court has already decided that there was a fraudulent intent; and if it was previous, the law will assume a fraudulent intent.

Cur. adv. vult.

April 24. *KEKEWICH J.* After hearing the evidence I was satisfied that the insolvency of the settlor at the date of the settlement in question was sufficiently proved, and that the circumstances under which the settlement was executed were such as to render it obnoxious to the statute 13 Eliz. c. 5, if, having regard to the provisions of that statute and the property

(1) [1904] 2 K. B. 824.

(3) (1879) 4 App. Cas. 504, 519.

(2) L. R. 4 Ex. 154.

(4) (1743) 2 Atk. 608, 609.

KEKEWICH purporting to be conveyed, the settlement ought to rank as one made to delay, hinder, or defraud creditors.

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On the question whether the settlement was of this character I reserved judgment. The solution of that question depends on this: will the settlement if it stands take anything out of the reach of the creditors, or, in other words, will they be in any worse position than if the settlement had never been executed? It was said that the plaintiffs are not entitled to sue on this footing, because, although they were undoubtedly creditors at the date of the settlement, their debt has been merged in a judgment recovered by them against the settlor, and can no longer support a right of action. The answer to this is that even if the plaintiffs' debt ought to be strictly regarded as subsequent to the settlement the plaintiffs can sue in respect thereof, there being sufficient evidence that debts due at the date of the settlement still remain unpaid.

Probably the operation of no statute has been affected so much by subsequent legislation as that of 13 Eliz. c. 5. Property which was not originally within the reach of creditors has from time to time been brought within their reach, and whenever that has been done the Courts have been prompt to recognize that such other property can be disposed of fraudulently as against creditors, that is, so as to delay, hinder, or defraud them in pursuing newly conferred rights of proceeding.

It was but faintly, if at all, contended that the property comprised within the settlement in question, to be presently described, fell within the mischief of the statute as it originally stood, or that it was brought within the mischief of the statute by any subsequent alterations of the law other than two, namely, first, the Judgments Act, 1838 (1 & 2 Vict. c. 110), s. 14, and, secondly, the modern procedure known as equitable execution, and I do not propose to deal with any others or the authorities respecting them.

In order to see whether the plaintiffs' rights have by these two specified alterations been in anywise enlarged, it is necessary to consider what the debtor had to convey by the settlement of February 13, 1906. The settlement purports to deal only with the interest of the settlor under the will of his father, John

Holland. By that will the testator gave all his residuary estate, which consisted of personalty, upon trusts for sale and investment of the proceeds, and he directed the investments to be held upon trust to pay his wife the annual income on the sum of 9000*l.* for her life or widowhood, and on her second marriage to pay her the income of 4000*l.* for the remainder of her life. He further directed that on her second marriage there should be made certain payments, including one of 1000*l.* to the settlor, his son Christopher Holland, and that on her death what remained of the 9000*l.* should be divided between his sons, Christopher Holland taking one-third. He disposed of the rest of his estate over and above the 9000*l.* in favour of his sons, but that is immaterial, as there was not more than enough to provide the 9000*l.* The wife is still alive, and there has been no second marriage, and the 9000*l.* is now represented by divers investments, which include a mortgage as well as stocks in the names of the trustees of the will.

The interest, therefore, of Christopher Holland, the settlor, has all along been and still is an equitable reversionary interest in the funds representing the 9000*l.*, the investment of which may, of course, vary from time to time. Can such an interest be reached by a charging order under the provisions of the Judgments Act, 1838, s. 14? Applicants under that section must be judgment creditors, but the plaintiffs fill that character; and the provisions of the section are conceived in such wide language that they apparently cover any case in which the judgment debtor has an equitable interest. There was raised in *South Western Loan and Discount Co. v. Robertson* (1) the question whether the section ought to be confined to cases where the judgment debtor is solely interested in the trust funds, but this was decided in the negative, and the point has, so far as I am aware, never again been mooted. The same case is an authority for holding that the provisions of the section extend to a reversionary interest, an extension which must now be treated as established even apart from the enactment of the Judgments Act, 1840 (3 & 4 Vict. c. 82), s. 1. *Bolland v. Young* (2) is a recent and further authority on this point.

(1) 8 Q. B. D. 17.

(2) [1904] 2 K. B. 824.

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Against these there was cited *Dixon v. Wrench*. (1) As regards that case it is sufficient to quote the language of Stirling L.J. in *Bolland v. Young* (2), who says that the judgment seems to have proceeded on the ground that in that case there was an imperative obligation to convert the shares into money at a definite time and that the only interest of the judgment debtor was in the proceeds of that conversion and not in the shares. Here, to use again the language of Stirling L.J., there is no imperative trust for sale, and the judgment debtor may hereafter acquire an absolute title to a portion of the trust property in specie, and so long as it remains unsold he has an interest in it. Reading the observations which I have thus adopted with the comments of the Lord Justice on *Cragg v. Taylor* (3), I venture to doubt whether *Dixon v. Wrench* (1) can be relied on as an authority to-day, but, at any rate, it is distinguishable from the present case on the grounds above stated. My conclusion, therefore, is that the plaintiffs might by proper proceedings have obtained a charging order on Christopher Holland's interest under his father's will, and that the assignment of that interest in settlement has delayed, hindered, or defrauded them within the meaning of the statute.

I had contemplated going somewhat fully into the question whether Christopher Holland's interest under his father's will could be reached by the process termed equitable execution, so that a settlement interfering with that process would be brought within the mischief of the Statute of Elizabeth. After consulting many authorities and pondering over the matter, I have come to the conclusion that full treatment of this question would require something in the nature of a lecture or treatise, which it is better to avoid unless absolutely necessary. My observations, therefore, do not pretend to be exhaustive. The authorities bearing on the point cannot be said to be wholly satisfactory, and the law must be taken to be still in the making. It seems to me that this remedy is competent in any case in which equity would of old have stepped in to enjoin or remove an obstacle to the enforcement of legal process: *Harris v. Beauchamp*

(1) L. R. 4 Ex. 154.

(2) [1904] 2 K. B. 824.

(3) (1867) L. R. 2 Ex. 131.

Brothers (1), and the practical application of that doctrine is to be seen from the passage from Mitford's Chancery Pleadings cited in the same case, and the language used by Davey L.J. on p. 811. I do not pause to consider the proper meaning of the term "equitable execution." That has been done again and again, and all practitioners are perfectly aware that there is no execution at all, but that by the appointment of a receiver the judgment creditor can prevent the receipt by his debtor of anything to which he is equitably entitled. Notice of the appointment to the trustees in possession is, of course, necessary to perfect the title of the receiver, but this it would be his first duty to give. The question whether the Court could or would appoint a receiver of an equitable reversionary interest was distinctly raised in *Tyrrell v. Painton* (2), and the appointment was made on the express ground that, according to the authorities, that relief is a proper remedy when an elegit cannot be issued. Lindley L.J., while recognizing the difficulty that during the life of the tenant for life there would be nothing for the receiver to receive, concurred in thinking that the appointment might properly be made, and thought that it might possibly be useful. I have no doubt that this decision and the principle of it have been frequently followed and applied, and that the plaintiffs might have obtained the appointment of a receiver in this instance.

Of the real practical effect of such an appointment there is, perhaps, some room for doubt, the authorities not being altogether explicit. It was established in *Flegg v. Prentis* (3) that no declaration of charge can be made on a judgment debtor's reversionary personalty in favour of a judgment creditor who has obtained such an appointment, and it follows that the judgment creditor has no right to have his debt raised by sale or mortgage of that subjected to the receiver. And it was decided in *In re Potts* (4) that the order appointing a receiver does not make the judgment creditor a secured creditor within the meaning of the Bankruptcy Act, 1883. What then is the utility of such appointment indicated by Lindley L.J. in *Tyrrell v. Painton*? (2) The Lord Justice, to some extent,

(1) [1894] 1 Q. B. 801, 807, 811.

(2) [1895] 1 Q. B. 202, 206.

(3) [1892] 2 Ch. 428.

(4) [1893] 1 Q. B. 648.

KEKEWICH answers the question himself. He says: "The appointment of a receiver does not create a charge, but it operates as an injunction to restrain the defendant from himself receiving the proceeds of sale." And in *In re Marquis of Anglesey* (1) Swinfen Eady J. explains, by reference to *Levasseur v. Mason & Barry, Ltd.* (2), the advantage of obtaining such an order. The same learned judge in the same case, in a passage immediately preceding that to which I have just referred, says: "In my opinion it prevents the debtor from dealing with the moneys to the prejudice of the judgment creditor; and it also prevents any subsequent judgment creditor from gaining priority over the creditor obtaining the order, if at the date when obtained the property of the judgment debtor cannot be taken in execution or made available by any other legal process." It was urged in argument that this statement by Swinfen Eady J. that the appointment of a receiver prevents the debtor from dealing with the moneys to the prejudice of the judgment creditor goes beyond, and indeed contravenes, other judicial expressions on the same point. That may be so, but I venture to think that this statement of the law will eventually prove to be sound. I do not myself see how the Court, after restraining the defendant from himself receiving the property, can stop short of granting whatever injunction is necessary to prevent its being received by others. The equitable principle involved in *Yescombe v. Landor* (3), which has been adopted in other cases, points in that direction. But, be that as it may, I have said enough to shew that the appointment of a receiver has some utility, is of some advantage to the judgment creditor as regards the equitable reversionary interest of the judgment debtor, and that suffices to bring the assignment of that interest which prevents the appointment of a receiver within the mischief of the Statute of Elizabeth. Therefore, in my opinion, this settlement cannot stand against the creditors of the settlor represented by the plaintiffs, and they are entitled to judgment. I will not dispose of the costs until I have heard what is said by all parties interested.

(1) [1903] 2 Ch. 727, 731.

(2) [1891] 2 Q. B. 73.

(3) (1859) 28 Beav. 80.

Stewart-Smith, K.C. The plaintiffs are entitled to a declaration that the settlement is void, and to have the settlement delivered up to be cancelled, according to the form No. 1 on p. 2345, Seton on Judgments, 6th ed., vol. iii. The infant defendant's costs have been arranged, but the plaintiffs are entitled to the costs of the action against the defendant Holland. With regard to the costs of the trustees, they had notice of all the facts when the settlement was executed, and they should at least pay their own costs. They ought not to have their costs, for not only did they take under a fraudulent deed, but they knew of it: *Elsey v. Cox*. (1) In *Merry v. Pownall* (2), where there was a forfeiture on bankruptcy, your Lordship gave the trustees costs out of the fund, but in that case, of course, the settlement stood.

[KEKEWICH J. *Dutton v. Thompson* (3) shews that it is a matter of discretion.]

It seems extraordinary that when the Court has declared that the property belongs to someone else, the trustees, who fought the action, should have their costs out of the property. We submit that this is not a case for the exercise by the Court of its discretion in favour of the defendant trustee.

P. O. Lawrence, K.C. The settlement is only voidable, not wholly void; it is good against all but the creditors. The right form of order is No. 3 on p. 2346 of Seton, 6th ed., vol. iii., directing the trustees to join and concur in making the property available for the creditors; and that affects the question of costs. So far from hindering the creditors, the settlement has preserved the property for them. This defendant is entitled to his costs; he has discontinued to act for his co-trustee, the defendant Sly. Sly executed the agreement of March 30, 1906, but this defendant declined to execute it. The settlement was made to protect the wife, not to defeat the creditors. If there had been an intent to defraud, the reversionary interest would have been sold and the proceeds sent direct to the wife. Having regard to the fact that the settlement is not wholly set aside and to the conduct of this defendant, this is a fit case for the

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(1) (1858) 26 Beav. 95.

(2) [1898] 1 Ch. 306.

(3) (1883) 23 Ch. D. 278.

KEKEWICH J. Court to exercise its discretion in his favour: *Merry v. Pownall* (1), which in this respect is not distinguishable from this case. Trustees will never defend a settlement in cases of this nature unless they are reasonably sure of getting their costs.

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Stewart-Smith, K.C., in reply. The form of the order No. 3 on p. 2346 of *Seton* is not applicable, because there is no property with which the trustees can deal. In *Reese River Silver Mining Co. v. Atwell* (2), in which that order was made, there was property in possession, but here it is reversionary, and there is nothing which the trustees can be called upon to do to vest the property in the plaintiffs. The point is only urged now in order to give the defendant trustee a peg on which to hang his application for costs. The settlement ought to be set aside in its entirety. In the most favourable circumstances the amount coming to the defendant Holland cannot satisfy his debt to the plaintiffs. *Merry v. Pownall* (1) was a very peculiar case, and the trustees only put in a defence submitting to deal with the property as the Court should direct, and they only acted as stakeholders. If this defendant trustee had put in a similar defence and appeared by counsel with a hand-brief at the hearing, the case would have been different, but he has put in a contentious defence and fought the action. He knew all the circumstances of the case before the execution of the settlement, and ought not to have his costs. If this reversionary interest is sold now, a very large part of the proceeds will be swallowed up in paying this defendant's costs.

KEKEWICH J. Two points now require decision, and they are perfectly independent. The first relates to the form of the order so far as it deals with the avoidance of the settlement. Without doubt there must be a declaration that the particular settlement is void as against those creditors of Christopher Holland who can come in now and claim against the settlement. Who are those creditors? I have some, but not full, information about them. I do not know what is the amount of their debts. There may be some creditors who have not yet come in. Some of the others may, after all, not rank for the sums for which

(1) [1898] 1 Ch. 306.

(2) (1869) L. R. 7 Eq. 347.

they are supposed to rank. Moreover, some provision has been already made for the payment of the debts. I really do not know what it is, and it is impossible for me to say exactly what amount is required to pay the creditors 20s. in the pound on their provable debts. Then, again, I really do not know what the value of the property is. I know that it cannot exceed a certain sum. I have particulars of the investments, and I know what they would realize if the reversion fell into possession to-day and the investments could be sold at the present market value. I do not know what the actuarial values of the prospective interests are. Therefore I do not know what will be available for the creditors, whether they wait till the reversion falls in or whether they insist upon the sale of Christopher Holland's reversionary interest as comprised in the settlement. But I can draw a reasonable inference that there will not be sufficient to pay them in full, although it is not a certainty. However, whether it is a certainty or not, I think I ought to make the order in a form which will be applicable to other cases where the certainty may be greater, and not to make it in a form which would be inapplicable to other cases where the Court may look forward with more confidence to a surplus. I have no doubt that this form, No. 1 on p. 2345 of Seton, is an old form. It is taken from a decision in the case of *Cazenove v. Pilkington* (1) in the Rolls in 1858, and my own recollection is that it is in common form. Notwithstanding, I venture to think that it is not a correct form. In old times attention does not seem to have been paid to the fact that, after all, there might be a surplus out of funds comprised in a voluntary settlement, and that the beneficiaries would be entitled to the surplus, whatever it was, if the deed was only set aside as against the creditors. It seems to me wrong to say that the settlement is to be given up and cancelled. Cancellation means a good deal where there is an assignment of a reversionary interest in personal estate, for if that is to be delivered up and cancelled, the settlement is gone altogether, and the beneficiaries under it, if there should turn out to be a surplus in any case, can only claim it by independent subsequent proceedings. That must

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be wrong. It seems to me that unless the Court is satisfied, and can make it appear on the face of the order that it is satisfied, that nothing can in any possible event come to the beneficiaries, it ought to provide for setting aside the settlement only so far as is required for the payment of the creditors. That is provided for in the earlier part of the form No. 1, to which I have referred, but it is lost sight of in the later part, which directs the deed to be delivered up and cancelled. The form No. 3 on p. 2346 of Seton seems to me to be the better form and to give the plaintiffs all that is necessary. It has been pointed out to me that the case from which that form is taken is entirely different from this one. That may be so; but the question is whether the form is a good one and whether it may not be applicable, possibly with some alteration, to other cases. The form is that the defendants the trustees "join and concur in all acts and things necessary for making the property comprised in the" (settlement) "available for satisfying the claims of the plaintiffs and all other the said creditors" of Christopher Holland. That seems to me to be all that the plaintiffs require. If, as a matter of fact, an absolute assignment of this reversionary interest is necessary, either to some purchaser or mortgagee, to pass the whole interest at once, then the trustees will have to join and concur in all acts for that purpose. But they will have to see, with the assistance of the Court, before they part with the whole interest, that that interest down to the last penny is required for the payment of creditors.

It is said on behalf of the defendant trustee, Mr. Burroughs, that the propriety of this part of the order bears upon the costs of the trustee. In my opinion it does not. If the order is made in the form in which I have indicated, the result will be to leave Mr. Burroughs trustee for the creditors so far as is necessary to satisfy their claims, and when he is called upon to make an assignment he will, of course, have his costs of that assignment and of doing what is necessary in "joining and concurring in all acts and things necessary," but that only affects the subsequent costs. To my mind it bears not at all upon the question of the costs of the action to-day.

Now I pass to that point. There are two trustees, Mr. Sly

and Mr. Burroughs. Mr. Sly is not here to-day. He is on the record, and is bound by the judgment, but for very good reasons he has not appeared at the trial, and he is not here to ask for costs, nor do I think I ought to order him to pay costs. I deal with him summarily in that way. The difficulty is about Mr. Burroughs, the other trustee. He did not concur in the agreement of March 30, 1906, to which Mr. Sly was a party, and he has done his duty in defending the interests entrusted to him. No doubt it was formerly considered that if a settlement was set aside—I think the argument went on the settlement being altogether destroyed—logically the trustees would be set aside also, and there would be no longer any trustee or trust funds, and the result was that, having set aside the settlement, the Court had no jurisdiction to give the trustees costs out of the trust funds, there being really no trustee and no trust property. That is the decision in *Elsey v. Cox*. (1) I think those were the days when a distinction between setting aside a settlement as against the creditors and setting it aside as against all parties was not quite recognized in the way it is now, but at any rate that was the result. No doubt, for many years, it was understood that if the settlement were set aside the trustees could get no costs. But, as I understand it, that is not the law now. The matter was gone into in *Dutton v. Thompson* (2), and I understood *Dutton v. Thompson* (2) when I gave judgment in *Merry v. Pownall* (3) to alter the position entirely. The Court has a discretion, and a discretion which is extremely difficult to exercise, casting a very awkward responsibility upon the Court, but still one which the Court is competent to exercise and which it is the duty of the Court to exercise so far as it can. Take two extreme cases: first, the case of a trustee who is one of the framers of the settlement or, to use a word which is familiar in other branches of the law, one of the promoters of the settlement, and who knows all the circumstances, and knows the intention, if the law will allow it and ingenuity will obtain it, to take property belonging to a debtor out of the reach of his creditors, and who, in that position, comes afterwards and defends the

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(3) [1898] 1 Ch. 306.

KEKEWICH settlement, which is very much his own. In a case of that kind, whether the Court could make him pay the costs or not, I apprehend that the Court would not give that trustee any costs. Then, secondly, take the case, at the other end of the line, of a trustee who is not an original party to the settlement at all, but who has come in by new appointment, the first trustee having retired or died. He knows nothing of the circumstances under which the settlement was executed. He comes in to oblige a client or friend, and accepts the trust in perfect ignorance of its not being a good settlement. With regard to a man in that position, it seems to me clear that the Court would exercise its discretion in his favour with regard to his costs. He has done no harm and is entitled to a trustee's indemnity. I have taken two cases at the extreme ends of the line. This case falls within those limits. Mr. Burroughs certainly knew a good deal. He knew that the family were in destitution. He knew that Christopher Holland was in prison for embezzlement. He knew there were difficulties about paying debts, and he took part under those circumstances in preparing the settlement of which he was a trustee. So far he approaches the class which I have endeavoured first to explain, but I cannot satisfy myself that he knew that the settlement would be wholly void as against creditors. He did not know what the debts were, although he knew generally who the creditors were. He knew there was some security given, but I do not think I can properly infer that he supposed there would be nothing remaining for settlement upon the destitute family. I think I ought to give him credit for acting, not fraudulently, but in good faith, risking, perhaps, the chance of the settlement not standing altogether, but not necessarily believing that there would be nothing left for the beneficiaries under the settlement. Subsequently he finds that his co-trustee has debarred himself from protecting the settlement. It is his duty to come here and endeavour to protect it for the benefit of those who are the beneficiaries under it. He has not incurred more costs than necessary, and it was his duty so to act in that way. During part of the argument I was pressed with this: that if I say that a trustee in that position is not to have his costs, the next time a settlement is to be attacked

I shall have no trustee to protect the settlement. The trustee will content himself with either not appearing at all, or taking care that all counsel has is what Mr. Stewart-Smith calls a hand-brief, that is a brief without materials, so that I shall get no assistance from counsel for the trustee at all. That is a consequence very much to be deprecated, but I have endeavoured to dissociate that in my mind from any reasoning in favour of Mr. Burroughs, because I do not think that ought to influence me in considering whether in a particular case the trustee ought to pay costs or have no costs. It would be a sad result, but one which would have to be faced. However, I think Mr. Burroughs has done his best, and I cannot impute to him any dishonesty, using that term only in this sense, knowledge that he was doing that which was unlawful as against the creditors, and intending as far as possible to take property out of their reach which he knew could not, according to law, be taken out of their reach and run the risk of its being attacked. He very probably did know that there was a doubt about it. I think he must be credited with this: that he realized that there was something to be protected and that this was the best way to protect it. On the whole, I think I shall be exercising my discretion properly by saying that he is to have his costs out of the trust estate, and if he has them at all, of course, he must have them as between solicitor and client.

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Solicitors: *Freshfields; Guscotte, Wadham & Co.; O. B. Thomas, for Champney, Fream & Vowles, Gloucester.*

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Trade Mark—Registration—"Distinctive Mark"—Trade Marks Act, 1905
(5 Edw. 7, c. 15), s. 9, sub-ss. 4, 5.

A German company who were the owners of the Apollinaris mineral water spring at Neuenahr, in Rhenish Prussia, applied to register the word "Apollinaris" in England in class 44 in respect of mineral waters.

There was evidence of very extensive user of the word "Apollinaris," and that it meant the water from the applicants' spring and no other water. The Board of Trade having required the application to be made to the Chancery Division:—

Held that, on the applicants undertaking "not to use the mark except in respect of water from their property at Neuenahr or the neighbourhood thereof," the word "Apollinaris" ought to be deemed a "distinctive mark" within the meaning of s. 9, sub-s. 5, of the Trade Marks Act, 1905, and might fairly be registered under the Act.

When the evidence shews that the word sought to be registered distinguishes the goods of the proprietor of the mark, it is not the less "distinctive" of the goods of the proprietor because it also distinguishes the goods irrespective of the proprietor.

THIS was a motion on behalf of a German company, called the Actien-Gesellschaft Apollinaris Brunnen vormals Georg Kreuzberg, that an order might be made authorizing and directing the Registrar of Trade Marks to treat the word "Apollinaris" as a distinctive mark within s. 9, sub-s. 5, of the Trade Marks Act, 1905, and to proceed with the said application. The motion was made in consequence of a notice given by the Board of Trade to the applicants, pursuant to r. 39 of the Trade Marks Rules, 1906, requiring them to apply by motion to the Chancery Division to hear and determine the application. Notice of the proceedings was served upon the Registrar of Trade Marks pursuant to r. 129 of the same rules.

The applicants were the owners of the well-known Apollinaris spring at Neuenahr, in Rhenish Prussia, and their application was to register in England the word "Apollinaris" as a trade mark for mineral waters in class 44.

They acquired the spring in 1876 from the representatives of

one Georg Kreuzberg, who discovered it in 1852, and called it, after the name of Saint Apollinaris. There was in the neighbourhood a church of the same name situated on a hill called the Apollinaris Berg.

The reasons given by the Board of Trade for referring the application to the Court were :—

(1.) That “Apollinaris” was descriptive of the water from the Apollinaris spring;

(2.) That there had been a good deal of litigation over the mark previously;

(3.) That if the mark were registered, then, when the spring was exhausted, the applicants would be the proprietors of a registered trade mark in respect of goods which had ceased to exist.

The Board of Trade required the applicants to give strict proof of their claim. A number of affidavits were accordingly made by the two presidents of the London and Liverpool Chambers of Commerce respectively; by Mr. Prince, the chairman of the German company and managing director of the English Company; and by many other leading traders and heads of firms which dealt in mineral waters, to the effect that the name “Apollinaris” meant the water of the applicants’ Apollinaris spring at Neuenahr and no other water.

The name “Apollinaris” had always appeared upon every bottle in which the same had been sold as the distinctive name or title of the water, and during a period of thirty-three years, beginning from 1874, upwards of 536,000,000 bottles of the water had been sold to the world at large, of which 160,000,000 had been sold in the United Kingdom. There was an English company, called the Apollinaris Company, Limited, who were the sole consignees of the water for England and all parts of the world except Germany.

The previous litigation which had taken place was in respect of applications by this English company, and it was held in 1890 in *In re Apollinaris Co.’s Trade Mark* (1) that the word “Apollinaris” must be struck off the register on the ground that it had been in common use, was not a fancy word within the Act

(1) [1891] 2 Ch. 186.

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Astbury, K.C., and Sebastian, for the applicants. The policy of the new Act is that it is for the advantage of the public that all marks which are being used as trade marks should, as far as possible, be registered, so that people may see what they have to avoid; and a large number of old trade marks which had either been struck off or were not registerable before are now being put on by the Board of Trade. This is the first case under the new Act of 1905 which the Board of Trade has referred to the Court. In sub-s. 4 of s. 9 of that Act there is a considerable enlargement of the old Acts of 1883, s. 64, and 1888, s. 10, namely, that the “word or words” must have no “direct” reference to the character or quality of the goods; and also not be, “according to its ordinary signification,” a geographical name or a surname. The main alteration in the Act is in sub-s. 5, which is new, and says: “Any other distinctive mark, but a name, signature, or word or words, other than such as fall within the descriptions in the above paragraphs (1.), (2.), (3.) and (4.), shall not, except by order of the Board of Trade or the Court, be deemed a distinctive mark.” It is submitted that the word might come within the enlarged meaning of sub-s. 4, because it has no direct reference to the character or quality of the goods, and it is not, according to its ordinary signification, a geographical name; but, assuming that it could not be registered under sub-s. 4, then the word “Apollinaris” is clearly a “distinctive mark” within sub-s. 5. Sect. 9 goes on to provide that for the purposes of the section “distinctive” shall mean “adapted to distinguish the goods of the proprietor of the trade mark from those of other persons.”

[KEKEWICH, J. It is not to distinguish the goods, but the goods of the particular proprietor.]

Then the section proceeds: “In determining whether a trade mark is so adapted, the tribunal may, in the case of a trade mark in actual use, take into consideration the extent to which such user has rendered such trade mark in fact distinctive for the goods with respect to which it is registered or

proposed to be registered." So that a mark may be taken which, if it was a new one, would not be distinctive, but if it has been used for a number of years, and nobody else has used it, then it becomes identified with the goods in respect of which it is used. The evidence unquestionably establishes that the name "Apollinaris" distinguishes the water of the applicants' spring. If the spring changes hands, the trade mark will go with the spring, and if the spring dries up, s. 22 of the Act of 1905 will put an end to the mark. That section provides that "a trade mark when registered shall be assigned and transmitted only in connexion with the goodwill of the business concerned in the goods for which it has been registered, and shall be determinable with that goodwill." The applicants are therefore within the policy and the very words of the Act of 1905, and are entitled to the order for which they ask.

George Lawrence, for the Registrar of Trade Marks. The question is whether this is a "distinctive mark" within the Act. The name "Apollinaris" no doubt means water from the Apollinaris spring, and nothing else. But does it distinguish the goods of the applicants, the proprietors of the trade mark, from the goods of any other person? That is the meaning of the definition of "distinctive" as given by the Act. A difficulty may arise if the present owners sell their property on which the spring is, without selling the goodwill of the business. If the mark is registered, the owners of the spring would not have the mark, but the present applicants would have a mark which would distinguish something no longer belonging to them. They would be able to carry on the business of selling other waters. Some limitation should, therefore, be put upon the register limiting it to the waters from the particular spring.

[The undertaking mentioned in the judgment was subsequently agreed to.]

KEKEWICH J. It was necessary, in order to explain the application to the Court, to go into the old Acts. It is not necessary for me, in expressing my opinion, to go back to them. I will start with and deal only with the terms of the new Act of 1905, s. 9. The first question is, Does the word "Apollinaris" come within

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KEKEWICH any of the essential particulars described in s. 9? It certainly
 J. does not come within (1.), (2.) or (3.) of the sub-sections of that
 1907 section. It might be possible to hold that it comes within (4.),
 "APOLLINARIS" but I do not think it does. That sub-section is split up into two
 TRADE parts. You must not register a word having a direct reference
 MARK, to the character or the quality of the goods. To my mind
In re. "Apollinaris" has a direct reference to the character and quality
 of the water which the trade mark is intended to protect, namely,
 the water which is derived from the particular spring known as
 the Apollinaris spring. But whether that be so or not, it is
 clear to my mind that, according to its ordinary signification, it
 is a geographical name. It was held to be a geographical name
 before the Act when we had not the words "according to its
 ordinary signification," and I think it is still a geographical
 name "according to its ordinary signification." The selection
 of the word "Apollinaris" shews that the spring was so called
 because of the hill in the neighbourhood known by that name
 and the church dedicated to the saint, and whatever it might have
 been originally, everyone knows it now in that connection. I
 cannot myself think that it is not "according to its ordinary
 signification a geographical name." Then is it "any other
 distinctive mark"? It may be a distinctive mark notwithstanding
 that it is not within (1.), (2.), (3.), or (4.), but if it is not allowed
 within (1.), (2.), (3.), or (4.), then it cannot be registered except by an
 order of the Board of Trade or the Court, that is to say, it is not
 to be deemed a distinctive mark unless the Board of Trade or the
 Court think so. In this case the Board of Trade thought it right
 to refer it to the Court, and therefore it is for the Court to say
 whether it is a distinctive mark or not.

Now, what is a distinctive mark? There can be no doubt, on
 the evidence, that "Apollinaris," standing alone, distinguishes
 from all other mineral water the water which flows from the
 spring known as the Apollinaris spring. Is that distinctive?
 The Act says that it is not sufficient, and that that is not
 the test. One of the later paragraphs of the same section
 says: "For the purposes of this section, 'distinctive' shall
 mean adapted to distinguish the goods of the proprietor of the
 trade mark from those of other persons." You are not to

distinguish goods from goods, but you are to distinguish the goods of one proprietor from the goods of another proprietor. "Apollinaris," in this case, does distinguish the goods. Does it also distinguish the goods of the proprietor? It is suggested that if it distinguishes the goods, it cannot distinguish the goods of the proprietor. That seems to me to be unsound. If you can ascertain by evidence that the word does, as a matter of fact, distinguish the goods of the proprietor, it matters not to my mind that it also distinguishes the goods apart from the proprietor. The evidence goes to shew here conclusively that what is known by "Apollinaris" is the water belonging to the applicants here, who are the sole producers and vendors of the water. It distinguishes the goods of the proprietor, and not the less so because it also distinguishes the goods irrespective of the proprietor. Therefore, to my mind it is a distinctive mark which may fairly be registered under this Act, and the mere fact that it could not be registered before the Act, even though the question was litigated and decided adversely to the applicants, is immaterial now, because the Act is an amending Act, intended to bring within the area of jurisdiction many trade marks which otherwise could not have been registered.

The only other difficulty is this. The applicants at the present time own the property in which the spring is situated. I use the word "spring" in the vulgar sense as meaning, not merely the spot from which the water emerges from the earth, but the land in which the water lies and from which it eventually comes. They are the proprietors of the spring, but they might cease to be the proprietors. They might find that the production of the water was no longer remunerative, or for some other reason they might think it right to sell this property, which might be converted to other uses. They would still be the proprietors of this trade mark, and if it was registered simply "Apollinaris" they might sell other mineral waters under the name of "Apollinaris." There would be a severance between the business and the proprietorship, not by assignment or transmission of the business, but simply by their having parted with the property. It seems to me necessary, or at any rate highly convenient, that some protection should be given to the registrar against that, and I

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 "APOLLINARIS"
 TRADE
 MARK.
In re.

understand that the applicants are willing to give an "undertaking not to use the mark except in respect of the water from the applicants' property at Neuenahr or in the neighbourhood thereof," and, on that undertaking being given, I think the word ought to be registered. There will be a declaration that on that undertaking the word "Apollinaris" ought to be deemed a distinctive mark within the meaning of the Act of 1905, s. 9, and that the registrar be directed to proceed with the application.

The registrar comes here as a representative of the public and to protect the public, and, having regard to s. 48 of the Act, I think he is entitled to his costs.

Solicitors: *Janson, Cobb, Pearson & Co.; the Solicitor to the Board of Trade.*

G. M.

JOYCE J. FINE COTTON SPINNERS AND DOUBLERS' ASSOCIATION, LIMITED, AND JOHN CASH & SONS, LIMITED *v.* HARWOOD CASH & CO., LIMITED.

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 13.

[1906 F. 1007.]

Trade Name—Company—Similarity of Name—Deception—Right of Individual to use his own Name—Transfer to Company.

Although, in the absence of fraud or false representation, a man is entitled to carry on business in his own name in competition with a similar business, previously well established under the same name, notwithstanding that confusion and mistake may in consequence arise, yet, if he has never carried on such a business on his own account or in partnership with others, he cannot, by promoting and registering a company with a title of which his name forms a part, confer upon that company the rights which he, as an individual, possesses in the use of that name.

Tussaud v. Tussaud, (1890) 44 Ch. D. 678, observed upon.

TRIAL OF ACTION.

For many years prior to 1898 the firm of John Cash & Sons had carried on business at Mansfield, in the county of Nottinghamshire, as cotton doublers and spinners of yarn. The firm had a large and extensive connection and a high reputation in business, and the name "Cash" when used in connection with the class of

goods manufactured by John Cash & Sons had always meant yarns manufactured by the firm or their successors, the plaintiffs John Cash & Sons, Limited.

The plaintiff company the Fine Cotton Spinners and Doublers' Association, Limited, was incorporated in the year 1898, for the purpose of amalgamating into one concern a number of companies and firms engaged in spinning and doubling, and of carrying on the businesses of fine spinners and doublers hitherto carried on by them separately.

Among the firms so amalgamated was that of John Cash & Sons, and for the purpose of preserving the name of the firm the plaintiff company John Cash & Sons, Limited, was incorporated on November 2, 1898, and by an indenture dated December 23, 1898, John Harrison Cash, the then proprietor of the business of John Cash & Sons, conveyed to the plaintiff company the Fine Cotton Spinners and Doublers' Association the goodwill of the business lately carried on by him under the style of John Cash & Sons, together with all trade marks belonging to him in connection with the business. The said John Harrison Cash also agreed that he would not for a period of twenty-one years engage in or permit or suffer his name to be used in connection with any competing business.

Among the employees in the firm of John Cash & Sons was one John Harwood Cash, the only son of the said John Harrison Cash, and he was retained by the plaintiffs after the amalgamation as one of their managers at Mansfield. He continued in their service until April, 1906, when he resigned his position. Shortly after leaving the plaintiffs' employment John Harwood Cash, in conjunction with others, formed and registered the defendant company for the purpose and with the object of carrying on at Mansfield a similar business to that carried on by the plaintiffs.

The plaintiffs by this action sought an injunction to restrain the defendant company from using the name, style or title of Harwood Cash & Co., Limited, or any name so nearly resembling the name of John Cash & Sons, Limited, as to be calculated to mislead the public into the belief that the business carried on by the defendant company was the same as the business carried on

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At the time of the bringing of the action the defendant company had not commenced to carry on business, but there was evidence that confusion had already occurred between the two companies owing to the use by the defendant company of the name "Cash."

Astbury, K.C., Hughes, K.C., and Martelli, for the plaintiffs. Although John Harwood Cash may be entitled if he chooses to carry on in his own name a rival business to that of the plaintiffs at Mansfield, different considerations apply where, as here, he is in effect binding his name to a company for that purpose. The question in this case is whether there is such a similarity between the names of the two companies as to be likely to cause confusion or lead to deception: *North Cheshire and Manchester Brewery Co. v. Manchester Brewery Co.* (1); *Daimler Motor Co.* (1904) v. *London Daimler Co.* (2) It is not necessary to establish fraudulent intention in order to claim the intervention of the Court: *Cellular Clothing Co. v. Maxton & Murray.* (3) The Court will infer from the similarity of the names that confusion and mistake will occur: *Hendriks v. Montagu.* (4) In *Rendle v. J. Edgcumbe Rendle & Co.* (5) it was held that the defendant had no right to lend his name to a company, which name, from its being so like one already attached to an established business, would be calculated to deceive. Although the action is not based on fraud, it is clear that the use of this name will lead to deception, and the continuance of such user by the defendant company will amount to fraud: *Thompson v. Montgomery* (6); *Massam v. Thorley's Cattle Food Co.* (7) In such a case as this the defendant company cannot take advantage of John Harwood Cash's right to use his own name. It is open to them to choose a name which will not have the effect of causing confusion.

Upjohn, K.C., George Lawrence, and H. A. Hind, for the defendants. It is admitted by the plaintiffs that John Harwood

(1) [1899] A. C. 83, 84.

(2) *Times*, April 16, 1907.

(3) [1899] A. C. 326, 343.

(4) (1881) 17 Ch. D. 638, 645.

(5) (1890) 63 L. T. 94.

(6) (1889) 41 Ch. D. 35.

(7) (1880) 14 Ch. D. 748.

Cash might start and carry on this business in his own name, but it is said that he cannot do it through the agency of a company. There is no such difference in the law in the case of a company as distinguished from an individual. The principle is that nobody has any right to represent his goods as the goods of somebody else: *Reddaway v. Banham*. (1) The defendant company is not doing that. In the absence of fraud or false representation a man is entitled to sell goods under his own name: *Burgess v. Burgess* (2); *Turton v. Turton*. (3) The plaintiffs really want to restrain the defendants from using the word "Cash." The evidence goes to shew that "J. Cash's Yarn" has always been understood to mean the plaintiff's yarn, but in *S. Chivers & Sons v. S. Chivers & Co.* (4) Farwell J. said that it was not enough that the word had acquired a secondary meaning; but there was a further question, Do the defendants so describe their goods as to be likely to mislead purchasers into believing that their goods are the plaintiffs' goods? That case shews that where the use of a name is involved, the question has to be decided by just the same considerations as apply to any descriptive term, such as "Camel Hair Belting," and that the ratio decidendi is the same. S. Chivers & Co., the defendants in that case, were a limited company, but Farwell J. did not from first to last refer to any difference between the position of a company and the position of an individual. In this case there is no evidence of passing off, or of anything entitling the plaintiffs to an injunction against the use of the name "Cash." The defendant John Harwood Cash has dropped his name John because the other firm is John Cash & Sons, Limited, and he calls himself Harwood Cash; and the defendants have offered to state on their invoices and circulars that they have no connection with John Cash & Sons, Limited, but the plaintiffs are not satisfied with that.

With regard to the cases cited on behalf of the plaintiffs in *Massam v. Thorley's Cattle Food Co.* (5), the formation of the company was a great fraud; but the Court of Appeal did not

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(1) [1896] A. C. 199, 204.

(2) (1853) 3 D. M. & G. 896, 905. 428.

(3) (1889) 42 Ch. D. 128.

(4) (1900) 17 Rep. Pat. Cas. 420,

428.

(5) 14 Ch. D. 748.

JOYCE J. say in that case that the rights of a company were an entirely
 1907 different thing from the rights of an individual : if that were in
 FINE fact the law, there would have been no need for the Court to have
 COTTON inquired into the animus of the company in that case. *Rendle*
 SPINNERS v. *J. Edgcumbe Rendle & Co.* (1), *North Cheshire and Manchester*
 AND Brewery Co. v. *Manchester Brewery Co.* (2), *Dainler Motor Co.*
 DOUBLERS' (1904) v. *London Daimler Co.* (3), and *Tussaud v. Tussaud* (4)
 ASSOCIATION, were all cases which turned on fraud, and are not applicable.
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JOYCE J. Some years ago John Harrison Cash carried on a particular business under the style of "John Cash & Sons." John Harwood Cash, his son, was engaged in the business, not as a partner or principal, but merely employed by his father. In that state of things it is perfectly clear to me that he might at any time have severed the connection with his father and set up at any place and carried on a similar business under his name of John Harwood Cash. I think also that he might have taken partners, and the firm so constituted might have carried on business as "Harwood Cash & Co." or "John Harwood Cash & Co." I will not say as "Cash & Co.," but certainly as "John Harwood Cash & Co." or "Harwood Cash & Co."

Now in the year 1898 the plaintiff association purchased the business of John Harrison Cash, and they adopted an ingenious scheme for carrying it on through a subsidiary joint stock company with the title of "John Cash & Sons, Limited," which is still maintained. John Harwood Cash continued to be employed in the same business, but he was not placed under any restriction as to himself not carrying on a similar business if and when he pleased. Therefore he was entitled, as it seems to me, if he had left the plaintiffs' concern, carrying on business as "John Cash & Sons," to do exactly what I have said he was entitled to do as against his father before this plaintiff association ever came upon the scene. As at present advised I do not see how the plaintiff association or anyone else could have prevented John Harwood Cash from carrying on business in his own name.

But what has happened is this. He has left the plaintiff

(1) 63 L. T. 94.

(3) Times, April 16, 1907.

(2) [1899] A. C. 83, 84.

(4) 44 Ch. D. 678.

association, and without ever setting up in business for himself he, in conjunction with a number of other persons, has promoted, formed, and registered a joint stock company with the object and for the purpose of carrying on, and such company proposes to carry on, in the same neighbourhood, a precisely similar business to that formerly carried on by John Harwood Cash's father, and since by the plaintiff association, under the name of John Cash & Sons. This present action has been instituted to prevent that being done, the plaintiffs contending that if any other company bearing a title of which the name "Cash" in any way whatever forms part be allowed to carry on this particular business it will, under the circumstances, not only lead to confusion, but will be calculated to deceive and mislead the public into the belief that there is some connection or other between the two businesses. It has been shewn, I think, that, although John Harwood Cash and his associates have not yet begun to carry on business under the name of the defendant company, the fact of his connection with another business of the same character as the plaintiffs' in the same neighbourhood has already led to some confusion in the minds of careless and uninformed persons; but I do not see how John Harwood Cash is in any way to blame for that.

There is one question of fact in this case, and that is whether if the defendant company be allowed to carry on business in its corporate name this is calculated to lead persons who are or may be customers of the plaintiff association through this subsidiary company into confusion between the two companies, and mislead them into dealing with the new company when they intended to deal with the old. Without saying it is absolutely clear to my mind that this would be the result, it certainly is not clear to my mind that it would not, and, on the whole, I think it is possible, and even probable, that it would.

It must be borne in mind that John Harwood Cash has not carried on any business as "Harwood Cash & Co." and then transferred such business with the goodwill to the defendant company. In fact he has never carried on any business at all. In this action John Harwood Cash is not the defendant, but a new association, the designation of which is so chosen that the

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name "Cash" may form part of it. No doubt the name "Cash" is very valuable in connection with a trade of this kind. I do not doubt that John Harwood Cash considers that he is entitled to do what he has done. But the law is clearly, and, if I may say so, rightly, laid down in *Lindley on Companies*, 6th ed. at p. 153: "Any company trading in this country can restrain persons from registering another company to carry on a rival business under a name identical with or so like its own as to be calculated to deceive; so a company which has been already registered under such a name can be restrained from carrying on a rival business under it." The defendant company has, it seems to me, no legal right to the name "Cash" or any other name previously belonging to some one else the use of which might lead to deception. I consider, as the law stands at present, that a new company with a title of which the name "A," for instance, forms part has not the natural rights that an individual born with the name of "A" would have. I think, also, that such a company merely by registration does not acquire and incorporate the individual rights which its promoters may respectively have had to carry on business in their own names; and, further, I think that a person of the name of "A" without transferring a business and goodwill cannot, by merely authorizing the promoters of a company to use his name as part of their title, confer upon such company a right to do so as against other people who would be damaged thereby.

The result, I think, is that the fact of John Harwood Cash being a promoter or one of the signatories of the memorandum of association of this company is, under the circumstances, immaterial; indeed I am not sure that it does not strengthen the position of the plaintiffs in claiming what they do claim in this action, which, as I have already pointed out, is not against John Harwood Cash, who has rights, and undoubted rights, with reference to the use of his own name, but is against a new creation which had no existence before the registration of the company—which had no previous right, and has not since acquired any right or title, with reference to the name "Cash" at all from any person. Therefore I think the plaintiffs are entitled to an order. It is a mere question of law. I impute fraud to no one, and if I am wrong in

coming to this conclusion, which, I think, really follows from the judgment of Stirling J. in *Tussaud v. Tussaud* (1), I may be set right. I am disposed to think that the marginal note in that case is, if not wrong, at any rate rather curious. It is put in the form of a semble with a query, but, as I understand it, the propositions which are there stated, one as a semble and the other with a query, were really laid down by Stirling J., and I consider that the decision I am giving now is in accordance with his judgment. I think the plaintiffs are entitled as a matter of law to the order for which they ask.

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Solicitors: *George Trenam, for Addleshaw, Sons & Co., Manchester; Hind & Sons, for Wells & Hind, Nottingham.*

G. A. S.

PEMSEL AND WILSON v. TUCKER.

[1905 P. 2044.]

WARRINGTON J.

Vendor and Purchaser—Title—Defect—Light—Guarantee—Restrictive Stipulation—Drain—Sewer—Vesting in Local Authority—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 4, 13, 41—Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 19.

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The plaintiffs by an open contract agreed to buy from the defendants two houses "subject to right of light with owner of adjoining property being guaranteed." The houses had been recently built by the vendor, and contained no ancient lights. The adjoining house had also been built by the vendor and sold by him in 1897 to D., on which occasion he and D. mutually covenanted not to do anything to prejudice the right of light to the windows of each other's premises:—

Held, that this restrictive stipulation was a defect in the title.

Under part of the premises contracted to be sold ran a drain, into which opened the drains of two adjoining houses:—

Held, that this drain was a sewer, and was vested in the local authority under s. 13 of the Public Health Act, 1875; that s. 19 of the Public Health Acts Amendment Act, 1890, did not prevent it from vesting; that the vendor was therefore unable to convey all that he had contracted to sell; and that he had not made a good title.

ADJOURNED SUMMONS.

On April 29, 1905, an agreement was entered into between the defendant and the plaintiffs in the following terms:—

"I, Reuben Tucker, of 5 and 7, Market Street, Watford, in the

(1) 44 Ch. D. 678.

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county of Herts, agree to sell, and we, Arthur Frederick Pemsel and William Liley Wilson, of London Road, Hemel Hempstead, in the county of Herts, hereby agree to buy, all that freehold property known as Nos. 5 and 7, Market Street, Watford, in the county of Herts, subject to right of light with owner of adjoining property being guaranteed, for the sum of Two thousand one hundred pounds (2,100*l.*), subject to the conditions governing the sale of the Rose and Crown estate, possession on completion of purchase by the 25th of May, 1905. Deposit, 50*l.*; balance, 2,050*l.*”

The purchasers objected to the title on several grounds. First, that on investigating the title it appeared that there were stipulations restricting the erection of operative machinery on the property. His Lordship held that this point was covered by the conditions of sale of the Rose and Crown estate, and that the objection failed. The second objection was that the vendor was not in a position to guarantee the right of light; and the third, that a sewer running under the premises contracted to be sold was vested in the local authority, and not in the vendor, and that this constituted a defect in the title. On the second question it appeared that, with the object of proving that he was in a position to guarantee the right of light, the vendor had produced an agreement of October 20, 1897, made between himself and a Mr. David Duce, who was purchasing from him a house adjoining the two houses the subject-matter of the present contract. The agreement recited (*inter alia*) the conveyance of the house to Duce by deed of even date therewith; that Tucker was the owner of the workshop adjoining the premises thus conveyed; that Duce's house contained sixteen windows at the back thereof, and Tucker's workshop contained ten windows; and that it had been mutually agreed that neither Duce nor Tucker would do anything to the prejudice of the right of light to the windows of their respective premises. The agreement proceeded as follows:

“Now it is hereby agreed by and between the parties hereto that in consideration of the hereinbefore recited conveyance of the 6th day of June, 1896, and of conveyance of even date herewith, the said David Duce, his heirs and assigns, will not

at any time hereafter do or cause to be done anything which may interfere with or prejudicially affect the light to the ten windows of the workshop of the said Reuben Tucker, his heirs or assigns, and the said Reuben Tucker, his heirs and assigns, will not at any time hereafter do or cause to be done anything which may interfere with or prejudicially affect the sixteen windows of the messuages and premises conveyed to the said David Duce, his heirs and assigns, as aforesaid."

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All the houses in question had been erected since 1892, and the purchasers took the objection that the houses sold to them were by the agreement subjected to restrictive stipulations which were a blot on the title.

On the third objection it appeared that under part of the premises contracted to be sold there was a drain into which opened the drains from Duce's house and from a house belonging to another owner; and that there was in the vendor's workshop, under a flagstone, a manhole giving access to the drain. The purchasers alleged that this drain was a sewer vested in the local authority and not in the vendor.

On November 1, 1905, the plaintiffs and defendant admitting that the contract ought to be specifically performed if a good title could be made, an inquiry was ordered whether a good title could be made. The Master made his certificate on March 13, 1907, finding that a good title could be made, and that it was first shewn on June 28, 1905. The purchasers took out this summons, asking that that finding should be discharged or varied.

H. Terrell, K.C., and *Beddall*, for the purchasers. The property was sold "subject to right of light with owner of adjoining property being guaranteed." Under the contract the purchasers are entitled to a conveyance of the houses with a legal right of light to their windows. The vendor has entered into agreements with the tenants of adjoining houses to do nothing to prejudice their right to light to their respective houses. In the agreement with Duce, the vendor has granted an easement of light over his property, of which the purchasers now have notice. That will prevent them from enlarging their premises. The vendor must

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therefore put an end to that easement. If the easement were a matter that was patent the case would be different, but the houses are quite modern buildings, and there is therefore no question of ancient lights which would put the purchasers on inquiry. Further, the easement of light to the vendor's premises is of great importance to the purchasers for their business, and it cannot be that its continuance is to depend on the personal guarantee of the vendor. If the adjoining property were sold, the agreement with Duce, being only under hand, would not bind a purchaser from him without notice: *Carter v. Williams*. (1) To render an easement of light binding on subsequent purchasers, it must be granted by deed: *McManus v. Cooke*. (2)

The third objection to title is that there is a drain or sewer running down the centre of the property sold into which run drains from two adjoining houses. In law, it is submitted, this is a sewer. The question turns upon the construction of the Public Health Acts of 1875 and 1890, on which there are conflicting decisions. This is clearly a sewer within s. 4 of the Act of 1875. The term "sewer" is a comprehensive term. A drain which drains one house is a drain, but if it drains two or more houses it ceases to be a drain and becomes a sewer. This is a sewer, and it vests in the local authority under s. 13 of the Act. It would be perfectly clear that this is a sewer if the matter depended solely on the Act of 1875, but the Public Health Acts Amendment Act, 1890, has to be dealt with. Sect. 41 of the Act of 1875 enables the local authority, on complaint made of a nuisance, to open and examine drains, and if they are found defective to remedy the defects and charge the owners with the expenses. Sect. 19 of the Act of 1890 provides that, "(1.) Where two or more houses belonging to different owners are connected with a public sewer by a single private drain, an application may be made under s. 41 of the Public Health Act, 1875," under which the expenses of abating a nuisance might be recovered from the owners of the houses. "(2.) Such expenses may be recovered summarily or may be declared by the urban authority to be private improvement expenses under the Public Health Acts, and may be recovered accordingly. (3.) For the

(1) (1870) L. R. 9 Eq. 678.

(2) (1887) 35 Ch. D. 681.

purposes of this section the expression 'drain' includes a drain used for the drainage of more than one building." Sect. 11 provides that the expressions "drain" and "sewer" are to have respectively the same meaning as in the Public Health Acts. The question is therefore whether this is not a sewer, but a drain, so as not to be vested in the local authority. The fact that it was constructed after 1890 appears to be immaterial: Glen's Law of Public Health, 13th ed., p. 1609, where the meaning of a "private drain" is discussed. We submit that this is still a sewer. It is only for the purposes of s. 41 of the Act of 1875 that the definition of sewer in s. 4 of that Act is altered by s. 19 of the Act of 1890: *Bradford v. Eastbourne Corporation* (1); *Thompson v. Eccles Corporation* (2); *Wood Green Urban Council v. Joseph*. (3)

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Applying those authorities to the present case, it is submitted that the drain running through the property purchased is a sewer, and as such is vested in the local authority. The effect of a sewer being vested in a local authority is that the local authority acquires a limited interest in the soil occupied by the sewer. In *Bradford v. Eastbourne Corporation* (1), Lord Russell of Killowen C.J. appears to have decided that the soil of the sewer was not vested in the local authority, but the authorities cited by him do not support that view. In *Coverdale v. Charlton* (4) it was held that the local authority had a limited ownership in the soil of a street. And a similar decision was come to in *Rolls v. Vestry of St. George the Martyr, Southwark*. (5) In *Attorney-General v. Dorking Union* (6) it was held that the local authority had a limited ownership in the soil of the sewers vested in them: see also *Birkenhead Corporation v. London and North-Western Ry. Co.* (7) The precise point was decided in *Taylor v. Oldham Corporation*. (8) It is submitted, therefore, that in the present case there is a tunnel of about six inches in diameter running through the property sold which does not belong to the vendor, and to which he can therefore

(1) [1896] 2 Q. B. 205, 211.

(2) [1905] 1 K. B. 110, 118.

(3) [1907] 1 K. B. 182.

(4) (1878) 4 Q. B. D. 104.

(5) (1880) 14 Ch. D. 785.

(6) (1882) 20 Ch. D. 595.

(7) (1885) 15 Q. B. D. 572, 578.

(8) (1876) 4 Ch. D. 395, 402, 411.

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give no title. The case is not one for compensation, but for rescission. The contract in the present case contains no compensation clause. In *In re Brewer and Hankins's Contract* (1), where after the contract the purchaser discovered that there was a sewer passing under the garden at the rear and at some distance from the house, the Court, although holding that the matter was one for compensation under the compensation clause in the conditions of sale, considered that the case was very near the border line. In *In re Puckett and Smith's Contract* (2), where land was purchased for building purposes, and the purchaser subsequently to the contract discovered that there was an underground culvert running across it, the Court refused to enforce the contract at the instance of the vendor.

[WARRINGTON J. Do you say that on an open contract the purchaser is to be relieved if the vendor cannot shew a title to every yard of the property sold?]

Yes : *Pope v. Garland*. (3)

[WARRINGTON J. referred to *Flight v. Booth*. (4)]

The existence of a mere easement, e.g., a right of way, is a latent defect in title, which will entitle a purchaser to rescind notwithstanding that the contract contains a compensation clause : *Ashburner v. Sewell*. (5) A restrictive covenant is a defect in title, entitling the purchaser to be relieved from the contract : *In re Cox and Neve's Contract*. (6) The right of the local authority to dig up the land to repair the sewer is much more than a mere easement, assuming that the soil of the drain is not vested in the local authority.

[WARRINGTON J. The mere existence of a manhole would not shew that the drainage came from other houses.]

That is so. There is no evidence that the plaintiffs were told of the existence of this drain. The purchasers purchased the property for a motor garage, for which purpose inspection pits are necessary, and the making of these will be interfered with by the sewer.

Rowden, K.C., and *Manning*, for the vendor. No question of

(1) (1899) 80 L. T. 127.

(2) [1902] 2 Ch. 258, 264.

(3) (1841) 4 Y. & C. Ex. 394, 403.

(4) (1834) 1 Bing. N. C. 370.

(5) [1891] 3 Ch. 405.

(6) [1891] 2 Ch. 109.

misrepresentation is raised, and we submit that we have shewn a good title to the property agreed to be sold. The objection with reference to light is not a ground for refusing specific performance: *Allen v. Seckham* (1); *Greenhalgh v. Brindley*. (2) In fact, the purchasers will get these houses with all the usual rights. We made no representations on the subject, and were not bound to disclose the agreement with Duce. The purchasers had constructive notice of the state of affairs: *Patman v. Harland*. (3) Assuming for the purposes of this argument that the adjoining houses have the right of sending their sewage down this drain, that does not affect our title. There has been no such vesting of the soil of part of the property in the local authority as would make our title to that part defective. That may have been formerly the case; but it has been altered by s. 19 of the Public Health Acts Amendment Act, 1890. The existence of the drain is at most a matter for compensation: *In re Brewer and Hankins's Contract* (4), where it was held that the existence of a sewer under the property was not an objection to the title. In *Attorney-General v. Dorking Union* (5) Jessel M.R. said that it must be remembered "that the vesting of the sewers in the local authority gives them a very limited right of ownership"; and it has been decided that the subsoil of a street is not vested in the local authority by the Act of 1875 beyond what is essential for maintaining the street: *Rolls v. Vestry of St. George the Martyr, Southwark* (6); *Tunbridge Wells Corporation v. Baird*. (7) There is only a vesting for the purpose of enabling the local authority to manage and work on the sewers. But s. 13 of the Act of 1875 has been modified: *Bradford v. Eastbourne Corporation* (8), and now there is no such purpose, for by s. 19 of the Act of 1890 the works are to be done by the owners of the property. Under that section, which incorporates s. 41 of the Act of 1890, this is a drain, and the owner of it can be made to abate a nuisance; and there is no longer any reason why the drain should vest in the local authority. At all events, there has

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(1) (1879) 11 Ch. D. 790, 795.

(2) [1901] 2 Ch. 324.

(3) (1881) 17 Ch. D. 353.

(4) 80 L. T. 127.

(5) 20 Ch. D. 595, 604.

(6) 14 Ch. D. 785, 796.

(7) [1896] A. C. 434.

(8) [1896] 2 Q. B. 205.

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been no such vesting as would interfere with our title. If the purchasers are right it will be necessary on every sale of a house in a town to add to the description of the property the words "or such part thereof as is not vested in the local authority." The jurisdictions under s. 13 of the Act of 1875 and under s. 19 of the Act of 1890 are mutually exclusive. The power to call upon private owners to abate a nuisance is inconsistent with the vesting of the drain in the local authority. If the adjoining owners have a right to use this drain that is not an objection which would entitle the purchasers to rescind the contract; it is a ground for compensation only: *Flight v. Booth*. (1) It is only an easement, and the question is whether the purchasers will get substantially all that we have agreed to sell; it is not a defect in title: *Fry on Specific Performance*, 4th ed. pp. 375, 399. In *Ashburner v. Sewell* (2) there was a latent defect which constituted a defect in title. In *In re Puckett and Smith's Contract* (3) Stirling L.J. said that there was no question of title.

Beddall in reply.

Cur. adv. vult.

May 10. WARRINGTON J. stated the facts and disposed of the first objection, and continued:—Secondly, the purchasers raise an objection to the title which is divisible into two branches. The first branch of the objection refers to, and is founded upon, the condition contained in the contract in favour of the purchasers, "subject to right of light with owner of adjoining property being guaranteed." The purchasers say that even if it be the fact that the vendor is in a position to guarantee, as it is called, the right of light, he was not in a position to do so, or at any rate he had not shewn he was in a position to do so on the date mentioned by the Master's certificate. It seems to me that that stipulation is one not referring to title, but that it is a separate and independent stipulation, which would be satisfied by the vendor in the conveyance guaranteeing (whatever that may mean, and it is not my business now to interpret the word) the right of light over the adjoining property.

(1) 1 Bing. N. C. 370, 376.

(2) [1891] 3 Ch. 405.

(3) [1902] 2 Ch. 258.

But that is only one branch of the objection in reference to the light. There is another branch of the objection which it is necessary to deal with, because if it is well founded it does affect the title. With the object of proving that he was in a position to guarantee, that is, to give to the purchasers an absolute right to the light of the houses they were buying, the vendor produced a memorandum of agreement, dated October 20, 1897, made between himself and a man named David Duce, who was purchasing from him a house adjoining the two houses the subject-matter of the contract, and that agreement was in these terms. After reciting the facts, which I need not read, it proceeds as follows:—[His Lordship read the passage set out above, and continued:—] The objection on the part of the purchasers is that the vendor cannot make a title such as he is bound to make under an open contract, because he has by the documents of title which he has produced shewn that he and the purchasers from him with notice would be under an obligation to the adjoining owner not to do anything which would interfere with or prejudicially affect the windows of the adjoining house. In my opinion, that is a good objection. I do not see how he can get over that objection unless I were to hold, as, of course, we know it is impossible to hold, that a vendor makes a good title on an open contract where it appears that the property is subject to some restrictive stipulation, something which would entitle a third person to interfere with the free use which the purchaser may choose to make of the property which is the subject-matter of the contract. At first I thought that, these being two houses in a town, it might be that the purchasers might fairly be held to have bought subject to such rights of light as there might be in the adjoining owner, but I do not think that is so. These are new houses, built, as appears by the abstract itself, some time since the year 1892, and there is this also, that the effect of this agreement is not merely to confer on the adjoining owner such right of light as he might acquire by prescription under the Prescription Act, but it is an express contract that the vendor will do nothing which may interfere with or prejudicially affect the sixteen windows of Duce's house. Now it seems to me under that agreement the adjoining

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owner might well contend, and (without expressing any definite opinion on it), the point is certainly arguable, that he would be entitled to greater rights than those which we know he would be entitled to under the Prescription Act. It seems to me, therefore, that the objection of the purchasers founded on that document is a good objection, and that the vendor cannot make a good title.

Then there is another objection which the purchasers have raised, which, as it has been argued, and seems to be the most important of all the objections, I think it is necessary to deal with, although of course what I have said with regard to light would be enough to entitle the purchasers to a discharge of the certificate. The objection is this. The houses are two houses in a town, and it is admitted that under one of the houses, the subject-matter of the contract, runs a drain into which run drains from two adjoining houses belonging to other owners, and it is said that by virtue of and under the Public Health Act, 1875, that drain is a sewer and is vested in the public authority, and being vested in the public authority, the vendor is not able to make a good title to the whole of the property which he has contracted to sell. The material sections of the Public Health Act, 1875, are these. There is first the definition section, s. 4, which says: "‘Drain’ means any drain of and used for the drainage of one building only, or premises within the same curtilage, and made merely for the purpose of communicating therefrom with a cesspool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed. ‘Sewer’ includes sewers and drains of every description, except drains to which the word ‘drain’ interpreted as aforesaid applies, and except drains vested in or under the control of any authority having the management of roads and not being a local authority under this Act." Now the first question is, Is this drain a sewer? It seems to me it is quite plain that it is a sewer; it is not a drain of and used for the drainage of one building only or premises within the same curtilage; it is used for the drainage not only of the houses to which it may be said to belong, but of the two adjoining houses. It seems to me, therefore, that

within the definition of the Public Health Act, 1875, it is a sewer.

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Now if it is a sewer it is necessary to see what result follows. By s. 13 it is provided that "all existing and future sewers within the district of a local authority, together with all buildings works materials and things belonging thereto," except certain exceptions which are not material, "shall vest in and be under the control of such local authority." If, therefore, I am right in the conclusion I have come to under the definition clauses, this sewer vests in the local authority.

But it does not stop there. There are a number of sections immediately following s. 13, which provide for and define the rights and obligations of the local authority in regard to the sewers which are vested in them. Sect. 15 provides that "every local authority shall keep in repair all sewers belonging to them." Sect. 19 provides that "every local authority shall cause the sewers belonging to them to be constructed covered ventilated and kept so as not to be a nuisance or injurious to health, and to be properly cleansed and emptied." Now all those provisions therefore entitle and oblige the local authority for the purpose of duly performing their duties to do certain works. It is enough to say that, in reference to this sewer or drain, it would give them the right to enter, to open the drain, to cleanse it, to alter it, or to enlarge it; and I cannot but think when one finds that property is subject, not only to an exception of the sewer which is vested in the local authority, but is subject to rights in the local authority such as I have described, that the existence of that exception and the existence of those rights and obligations and powers on the part of the local authority would be a defect in the title.

It is hardly necessary, I think, to say more in reference to that point, than to refer to what the Master of the Rolls said in *Taylor v. Oldham Corporation*. (1) In reference to the effect of s. 13 of the Public Health Act, or rather to a corresponding section in another Act which has the same effect, he says this: "It was found under the old law, and it was sometimes held, that the sewer authorities (they were not called sewer authorities

(1) 4 Ch. D. 395, 411.

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in those days) had only an easement, and it was found to be very inconvenient, and consequently in the modern Acts the property in the sewers has been vested in the sewer authorities. That is to say, that instead of allowing the subsoil to remain in the owner of the soil, subject to an easement or right of sewerage or drainage, the absolute property in the sewer (which means not merely the brick barrel, or whatever it may be, forming the sewer, but the whole interior of the sewer, that is, the whole of the space occupied by it) is now vested in the sewer authorities. And if the sewer is a large one, it amounts, in substance, for all useful purposes, to the whole of the subsoil, and that is absolutely vested in the corporation."

It is said by the vendor that that is quite true, or may be true, if the case depends on the Public Health Act, 1875, alone; but he says the Public Health Act, 1875, has been modified by a subsequent Act of 1890, and it has been so modified that for all practical purposes in reference to a drain of this kind the vesting provisions in the Public Health Act, 1875, are inoperative. Now let us see whether that is well founded. The provision to which he refers is s. 19 of the Public Health Acts Amendment Act, 1890, which has been adopted in this district. Sub-s. 1 of that section is this: "Where two or more houses belonging to different owners are connected with a public sewer by a single private drain, an application may be made under s. 41 of the Public Health Act, 1875 (relating to complaints as to nuisances from drains), and the local authority may recover any expenses incurred by them in executing any works under the powers conferred on them by that section from the owners of the houses in such shares and proportions as shall be settled by their surveyor or (in case of dispute) by a Court of summary jurisdiction." Then, after a provision as to how the expenses are to be recovered, sub-s. 3 provides: "For the purposes of this section the expression 'drain' includes a drain used for the drainage of more than one building." Therefore it comes to this: for the purposes of that section this sewer is not a sewer, but a drain, but it is for the purposes of that section, and that section only. It is necessary, therefore, to see what are the purposes of that section. Now the section refers to s. 41 of the Act of 1875.

That section of the Act was to this effect, that on the written application of any person to a local authority stating that any drain (amongst other things) is a nuisance or injurious to health (but not otherwise) the local authority may make an inspection, and may require work to be done to abate the nuisance; and if it is not done they may do it themselves and charge the work on the owner.

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Now I confess after much consideration I fail to see, unless I am bound by authority to hold otherwise, how that section interferes with or modifies the vesting section of the Public Health Act, 1875. All that it does is to bring under the operation of s. 41, which is confined to nuisances, what is called a private drain (an expression which is used in the Act of 1890 for the first time) taking the drainage of two or more houses belonging to different owners. But I cannot see how that divests that which under the Public Health Act is a sewer from the local authority. It is said that there is authority to the contrary, and that statement requires to be examined. The case that is referred to is a well-known case on the subject of the Act of 1890, namely, *Bradford v. Eastbourne Corporation*. (1) It is a decision of Lord Russell of Killowen C.J. and Wills J. The point that arose in that case was this. A private drain taking the drainage of two or more houses, belonging to different owners, had been constructed prior to the Act of 1890, and was in existence and was vested in the local authority at the time when the Act of 1890 was passed. It was contended in that case that s. 19 had no retrospective effect and did not apply to a drain of that nature already vested in the local authority. That was the point which had to be decided by the Court of Queen's Bench. The Court held that the contention that the Act was not retrospective was not well founded, and in the course of his judgment the Lord Chief Justice said this (2): "It has been clearly held that the vesting is not a giving of the property in the sewer and in the soil surrounding it to the local authority, but giving such ownership and such rights only as are necessary for the purpose of carrying out the duties of a local authority with regard to the subject-matter," and he then refers to a number of well-known cases, beginning with *Coverdale v.*

(1) [1896] 2 Q. B. 205.

(2) [1896] 2 Q. B. 211.

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Charlton. (1) He then proceeds: "But if the duty is partly or entirely shifted from the local authority to individuals, that right which the word 'vest' gives to the local authority disappears to the same extent. Therefore, it does not appear that there is any difficulty arising from the word 'vest' in s. 13 of the Act of 1875." Now what does that mean? It seems to me that it only means this: the duty of the local authority of providing against and abating a nuisance in a sewer is shifted to some extent by the Act of 1890 and thrown upon the owner, and to that extent—and that is all the learned Lord Chief Justice means—the rights of the local authority and the ownership of the local authority in respect of the sewer are shifted from it to the individual owner; but it in no way affects those other obligations and those other powers of the local authority which I have already referred to, and which are quite independent of the existence or non-existence of a nuisance in the drain in question. It seems to me, therefore, that all the learned Lord Chief Justice means, although some of the expressions which he has used were perhaps wider than was actually necessary for the decision of the point in question, is that there is no difficulty arising from the vesting section in the Act of 1875 in applying the 19th section of the Act of 1890. Nor is there any difficulty when one looks into it in saying that a sewer may still be vested in the local authority for all the purposes which are expressed in s. 13 and the following sections of the Act of 1875, and yet the private owner may for the purposes of abating a nuisance be under the obligations which are imposed upon him by s. 19 of the Act of 1890 and s. 41 of the Act of 1875.

It seems to me, therefore, that this drain which unfortunately exists under these houses is, except for the purposes of s. 19 of the Act of 1890, a sewer, and it is vested in the local authority. The local authority, and not the vendor, has therefore a property in some part of that which the vendor has contracted to sell, and not only has a property in some part of the subject-matter of the contract, but has rights which may seriously interfere with the enjoyment by the purchasers of that which they have bought. I am of opinion, therefore, that on the whole the Master's

certificate is wrong, and that I must allow the summons and discharge the certificate, and, in lieu of the finding of the Master, find that the vendor has not made a good title to the property.

Solicitors: *Wallington, Fabian & Co.; Camp, Ellis & Panton.*

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Practice—Staying Action—Cause of Action arising out of Jurisdiction—Action brought vexatiously and oppressively—Accessible Court where Cause of Action arose—Inconvenience causing Injustice to Defendant.

In 1902 a deed of separation was executed in India between the plaintiff and her husband, of which the defendant was the trustee. The plaintiff was the wife of an American domiciled in India, and the defendant then and still was a solicitor practising at Madras. The husband made default in paying the allowance which by the deed he had covenanted to pay, and the complaint of the plaintiff against the defendant was that he had wilfully or negligently delayed taking proceedings, and had so wilfully or negligently conducted proceedings against her husband that she had been unable to recover the moneys due to her in respect of the allowance. In October, 1906, the defendant happened to be in England on a holiday, and on the day before he left for India he was served with the writ in the action. At the date of the issue of the writ the plaintiff was temporarily in England, but left shortly afterwards for America, where she still remained. The plaintiff knew of her alleged cause of action when she was resident in India. On an application by the defendant to dismiss or stay the action on the ground that it was an abuse of the process of the Court:—

Held, that, inasmuch as the alleged cause of action arose in India, and that the liability, if any, of the defendant would have to be determined according to the law of India, and upon the evidence of Indian witnesses, the proper place for the action to be brought was India; that the action was not brought bona fide in England; that the injustice to the defendant in bringing the action in this country was so great that the Court would not allow the action to proceed; and that the fact that the plaintiff happened to be in England at the date of the issue of the writ was not in itself sufficient to preclude the Court from dismissing the action.

Logan v. Bank of Scotland (No. 2), [1906] 1 K. B. 141, applied.

MOTION.

The plaintiff, Mrs. Marion Thornton Egbert, was the wife of Jerome William Egbert, an American domiciled in India, who in

WARRINGTON J. 1902 was practising as a surgeon dentist at Madras. The defendant, James Short, then and still was a solicitor practising in the High Court of Judicature at Madras.

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In April, 1902, the plaintiff consulted the defendant as her solicitor with reference to differences which had arisen between herself and her husband, and on April 5, 1902, a deed of separation was executed between the husband and the plaintiff. The deed was made between the husband of the first part, the plaintiff of the second part, and the defendant as trustee of the third part, and by it the husband covenanted with the plaintiff, and by way of separate covenant with the defendant (*inter alia*), that he would during the joint lives of himself and the plaintiff, if they should so long live separate from each other, pay to the defendant the sum of Rs.400 on the 15th day of every month thereafter, commencing on April 15, 1902, and it was thereby agreed that such sum should be held by the defendant in trust for the plaintiff for her sole and separate use.

In June, 1903, the defendant, acting on the instructions of the plaintiff as her solicitor, and also as trustee, commenced proceedings against the husband in the Small Cause Court at Madras in the name of himself and the plaintiff to obtain payment of certain of the monthly sums of allowance then in arrear. The summons was not served on the husband until January, 1905, owing, as the defendant alleged, to the husband's absence from India. On April 6, 1905, judgment was recovered against him which still remained unsatisfied.

In 1906 the defendant was in England on a holiday from April until October, and left for India on November 1.

On October 30, 1906, the plaintiff issued her writ in the present action, claiming against the defendant as trustee of the deed of separation damages for breach of trust, or in the alternative against him as her solicitor damages for breach of duty and negligence. In the writ the plaintiff's address was given at an hotel in London. The writ was served on the defendant on October 31, 1906, the day before he started for India. At the moment of the issue of the writ the plaintiff was in England on her way to America where she still was to defend certain judicial proceedings brought against her there by her husband.

The plaintiff by her statement of claim alleged that the defendant, in breach of his duties as her solicitor and trustee, wilfully or negligently delayed taking any proceedings to recover the moneys due to her in respect of her allowance until June, 1903, after the husband, having disposed of all his property within the jurisdiction of the Indian Courts, had left India. She also alleged that the defendant had omitted to take steps to enforce the judgment obtained against him on April 6, 1905, and that, owing to such breaches of duty by the defendant as her solicitor or alternatively owing to the wilful default of the defendant as her trustee, the plaintiff had received no monthly payments under the deed since August 15, 1902.

This was a motion by the defendant that the action might stand dismissed on the ground that the same was frivolous and vexatious and an abuse of the process of the Court.

The defendant by his affidavit in support of the motion alleged that it was impossible for him under the circumstances to leave his business and come to England for the purpose of the case, and that he was advised that, having regard to the fact that the deed of separation was executed in Madras, and all proceedings in connection therewith were instituted there, the fact that all his witnesses and documentary evidence, consisting of the records of the Court in the various proceedings taken by him to recover arrears of the allowance and other papers, were there, the fact that the plaintiff herself had been residing there from the year 1902 until the year 1906, except for an occasional visit to America, and, lastly, to the fact that any alleged breach of trust or breach of duty on his part took place within the jurisdiction of the Madras High Court, that Court would be in a better position to decide upon all the facts of this case, having regard to the procedure governing debt in India, and to the difficulty and delays incidental to obtaining decrees and enforcing them; and he prayed that the proceeding in this action might be stayed, and the plaintiff directed to proceed against him in the Madras High Court for any alleged breach of trust or breach of duty as her trustee. He submitted that the plaintiff's conduct in serving him with the writ in England the day before his return to India instead of instituting such proceedings against him while he was

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in Madras, and when the relations between himself and the plaintiff from August, 1905, up to April, 1906, when he left for England, had become strained, and he had ceased to act for her professionally, showed that the present action was not a bona fide one on her part, but had been instituted solely for the purpose of harassing and annoying him.

The plaintiff by her affidavit deposed that her place of residence was and since September, 1904, had been in London, which was in fact her usual place of residence for some time previous to September, 1904; that she resided at London and at Beckenham, in Kent, continuously from September, 1904, until the end of January, 1905; and that, owing to the defendant's neglect of his duty as her trustee and his (the defendant's) failure to carry out her specific instructions in 1903 and 1904 and 1905 to institute a suit against her husband, who was then residing at Madras, she was obliged to undertake a journey to India in January, 1905, for the express purpose of getting her claim against her husband into Court. She further deposed that she lived in India from December, 1896, to July, 1898, and that she had never lived there since.

It was admitted that the statement of claim disclosed a prima facie cause of action against the defendant.

Rowden, K.C., and *Boydell Houghton*, for the motion. The action is an abuse of the practice of the Court. The cause of action, assuming there to be one, arose in India, and the defendant is a solicitor practising in the High Court of Madras. The action depends upon Indian law, and in order to defend it it will be necessary for the defendant to come to England and to bring with him Indian witnesses and official documents, or he will have to rely on taking the evidence of his witnesses on commission. To require him to do this would be ruinous to his practice, and would be so burdensome to him that the conclusion to which the Court, it is submitted, will come, is that the action is brought here in order that the defendant may be induced to settle rather than defend the action. We rely on *Logan v. Bank of Scotland (No. 2)*. (1) The only distinction between that

(1) [1906] 1 K. B. 141.

case and the present is that here the plaintiff happened to be in England at the date of the issue of the writ, but that circumstance is not, it is submitted, sufficient in itself to preclude the Court from exercising its jurisdiction to dismiss the action. The plaintiff can perfectly easily bring her action in India. She has trapped the defendant into an English action merely by reason of the accident that he happened to be in this country on a holiday. It is not a bona fide action brought in an English Court because there is no other Court available. There is no hardship in the plaintiff having to bring her action in the Madras Court.

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Frank Samuel, for the plaintiff. The plaintiff's claim is not per se either frivolous or vexatious. The defendant's affidavit in support of the motion does not disclose any circumstances shewing that the action is oppressive or vexatious. It would be a great inconvenience and expense to the plaintiff if she were compelled to bring her action in India, and there is no reason why she should be put to the inconvenience and expense of that course solely for the convenience of the defendant. The plaintiff has a right to bring her action either here or in India, and a fortiori she has the right to bring it here. Even if she were to bring her action in Madras it does not appear from the evidence that it would not be necessary to take evidence on commission at a great distance from Madras, where the defendant resides, and this would be as inconvenient to the defendant as if the action were brought here. It would be as convenient for the defendant to come to England as for the plaintiff to go to India. Evidence as to Indian law can easily be obtained in England. In *Logan v. Bank of Scotland* (No. 2) (1), the plaintiff resided in Scotland, whereas the plaintiff in the present case does not reside in India, and the Court must take this circumstance into consideration before it can be satisfied that no injustice will be done to the plaintiff in dismissing her action. Here an injustice will be done by putting the plaintiff to the inconvenience and expense of bringing her action in India. In *Thornton v. Thornton* (2), where the circumstances were analogous to those in the present case, the Court of Appeal refused to stay the

(1) [1906] 1 K. B. 141.

(2) (1886) 11 P. D. 176.

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action : see also *Peruvian Guano Co. v. Bockwoldt*. (1) The evidence shews that the defendant was able to come to England on a holiday for a considerable period in 1906, and also that he has a partner to look after his affairs in India during his absence.

Rowden, K.C., was not called upon to reply.

WARRINGTON J. This is an application by the defendant founded on the inherent jurisdiction of the Court to prevent an abuse of its process, asking that the present action may be dismissed on the ground that the same is frivolous and vexatious, and an abuse of the process of the Court. It is not alleged that the action is frivolous or vexatious in the sense that the statement of claim discloses no reasonable cause of action ; but it is said that the action is an abuse of the process of the Court owing to the oppression and injustice to the defendant which would result from allowing it to proceed.

The facts are these : The plaintiff is a married lady, the wife of an American, who, according to her own evidence, was, during the time in question, domiciled in India. In 1902 a deed of separation was executed between the plaintiff and her husband, of which the defendant, who was then, and is now, a solicitor, practising in Madras, was the trustee. The husband made default in paying an allowance which he covenanted to pay by that deed of separation ; and the complaint of the plaintiff against the defendant is that he wilfully or negligently delayed taking proceedings and so wilfully or negligently conducted proceedings against the husband as to bring about the result that she has been unable to recover from the husband the moneys due from him in respect of the allowance. The defendant happened to be in England for a short time last year, and on the eve of his leaving England for India he was served with the writ in the present action. The plaintiff was at the date of the issue of the writ temporarily—I say that advisedly—in England, and in the writ her address is given at an hotel in London. Shortly afterwards, as appears by the affidavit which she has herself filed, she left England for America, and she is there now. Moreover,

it also appears from facts which are not in dispute, and by allegations made by herself in her statement of claim, that she knew of and realized her alleged cause of action against the defendant at a time when both she and the defendant were personally resident in Madras, and at a time when, so far as I can see, there was no reason whatever why, if she had a cause of action, she should not have taken proceedings against him in India.

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I am asked, as I have said, to dismiss this action or to stay it (which really comes to the same thing), on the ground that to allow it to proceed would be so oppressive and vexatious to the defendant as to amount to such an injustice to him that it ought not to be permitted. Now I ought to mention this, that it is quite clear, not only from the defendant's affidavit, which I am entitled to look at for this purpose, but from the plaintiff's own statement of claim, first, that the matters of complaint entirely arose in India; secondly, that the liability of the defendant, assuming it to exist, is a liability arising under the law of India; and, thirdly, that with reference in particular to one claim, and indeed I think I may safely say with reference to all claims of the plaintiff against the defendant, the question of the liability or otherwise of the defendant depends on the course of procedure in the Indian Courts. The question whether he was guilty of wilful or negligent conduct as her solicitor depends entirely on what he did or omitted to do in reference to the conduct of proceedings in the Indian Courts, and will depend therefore upon what course was open to him, what the procedure of the Indian Courts allowed him to do as her solicitor, and what steps there were which he could take in the Indian Courts, and which he failed to take. To sum it up shortly, the proceedings are entirely Indian proceedings. The liability or otherwise of the defendant must be determined on Indian evidence. If the action is tried in London, the defendant must—I am not using the word “must” in the sense of physical compulsion, but if he behaves as an ordinary sensible man of business would behave—come over to England personally to defend the action, and he must either bring over documents and witnesses on his behalf to this country, or he must depend upon taking evidence on commission. What witnesses he would have to call I do not know, but from the

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affidavit which he has filed there must be several—possibly judges, certainly counsel, probably other solicitors—persons whom he could not get over here, but who, if they are to give evidence at all, must be examined in India. Now I have no doubt whatever that, looking at the matter from the point of view of the defendant alone, it would be a grievous injustice to him to allow this action to proceed, and I should have no hesitation in acting on the authority of *Logan v. Bank of Scotland (No. 2)* (1), which, as I have said, looking at the matter from the point of view of the defendant alone, is, in my opinion, directly in point. There is one circumstance, and one only, which distinguishes that case from the present, and that is that at the moment of the issue of the writ—and again I say advisedly at the moment of the issue of the writ—the plaintiff was physically in England—resident is another matter; and I have long since seen that the only question which I have to consider is whether that circumstance is sufficient to distinguish this case from *Logan v. Bank of Scotland (No. 2)*. (1) The question resolves itself, I think, into this. The jurisdiction which I am asked to exercise is one which, as has been frequently said, is to be exercised by the Court with extreme caution; and, further, it is one which the Court ought not to exercise if by so doing an injustice will be caused to the plaintiff, and the real question which I have to decide is whether by preventing what, in my judgment, is a grievous injustice to the defendant, I shall at the same time be causing an injustice to the plaintiff. If I should be doing so, then I think it would be my duty to refuse this application. That is the point that I must therefore consider.

Now there are one or two passages in the considered judgment of Sir Gorell Barnes in *Logan v. Bank of Scotland (No. 2)* (1) which throw some light upon the point. The first of those passages is one (2) in which in referring to the well-known case of *Ewing v. Orr Ewing* (3) he says this—I am summarizing the introduction to the passage I desire to read—that the practice of our Courts has been expressed by various judges in this way, namely “that the Court will interfere to prevent vexatious

(1) [1906] 1 K. B. 141.

(2) [1906] 1 K. B. 149.

(3) (1885) 10 App. Cas. 453.

proceedings which would have the effect of preventing the due administration of justice," and he refers to the statement of Bowen L.J. in *McHenry v. Lewis* (1) as to "The general principle that the Court can and will interfere whenever there is vexation and oppression to prevent the administration of justice being perverted for an unjust end." Then again he says this—this is Sir Gorell Barnes himself (2): "The Court should, on the one hand, see clearly that in stopping an action it does not do injustice, and, on the other hand, I think the Court ought to interfere whenever there is such vexation and oppression that the defendant who objects to the exercise of the jurisdiction would be subjected to such injustice in defending the action"—I am inserting those four words "in defending the action," which have obviously been slipped out by some mistake—"that he ought not to be sued in the Court in which the action is brought, to which injustice he would not be subjected if the action were brought in another accessible and competent Court." Then again he says (3): "It seems to me clear that the inconvenience of trying a case in a particular tribunal may be such as practically to work a serious injustice upon a defendant and be vexatious. This would probably not be so if the difference of trying in one country rather than in another were merely measured by some extra expense; but where the difficulty for the defendant of trying in the country in which the action is brought is such that it is impracticable to properly try the case by reason of the difficulty of procuring the attendance of busy men as witnesses, and keeping them during a long trial, and of having to deal with masses of books, documents, and papers which are not in the country where the action is brought, and of dealing with law foreign to the tribunal, it appears to me that a case of vexation in some circumstances may be made out if the plaintiff chooses to sue in that country rather than in that where everybody is and where all the witnesses and material for the trial are."

Now, as I said before, I think the only question is, whether, bearing in mind the fact that the plaintiff is not in India, I should by staying these proceedings be doing an injustice to her

(1) (1882) 22 Ch. D. 397, 408.

(2) [1906] 1 K. B. 150.

(3) [1906] 1 K. B. 151.

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sufficient to outweigh what I consider is established as a most serious injustice to the defendant if the action is allowed to go on. I do not think in this case I should be doing such an injustice to the plaintiff. She is not resident in England in the proper sense of the term. From her own statement she is obviously a rolling stone, who has been some time in India, some time in England, and is now in America. I think also that in all probability her action could be conducted without her personal attendance in India, whereas the defence of the defendant could obviously not be conducted without his presence here in this English action. I think also it is not immaterial to remember on this part of the case the fact which I mentioned in stating the facts that from her own statement she realized and knew at the time when she was in India that if she had a cause of action against the defendant she had it then. On the whole the conclusion at which I have arrived is that this action is brought in the tribunal in which it has been brought not bona fide for the purpose of obtaining justice, but for the purpose of harassing and annoying the defendant, and of obtaining something to which the plaintiff may not in justice be entitled. I think, therefore, that it is my duty to accede to the defendant's application. In my judgment there is no reason for staying the action. It is true that the action was stayed in *Logan v. Bank of Scotland* (No. 2) (1), but for the reason which I have pointed out in the course of the argument, namely, that the application there was made on behalf only of certain defendants. The proper order will be to dismiss the action and order the defendant's costs to be paid out of the fund which has been paid into Court as security for costs, and the balance of the fund to be paid to the plaintiff.

Solicitor for applicant: *Percy Short*.

Solicitors for respondent: *Gilbert Samuel & Co.*

(1) [1906] 1 K. B. 141.

W. I. C.

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[1906 B. 5066.]

[1906 B. 2699.]

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June 1, 3, 8.

Solicitor—Bill of Costs—Taxation—Agreement in Writing—Contentious Matters—Signature—Enforcement—Attorneys and Solicitors Act, 1870 (33 & 34 Vict. c. 28), s. 4.

The plaintiff, a solicitor, claimed in an account which was being taken before the Master a sum of 635*l.* alleged to be due under a memorandum signed by the defendants, in which they agreed the balance due to the plaintiff for his costs of contentious business previously done by him on their behalf. This memorandum was referred to in a letter signed by the plaintiff's firm and written by them to the defendants:—

Held, on the facts, that there was an agreement in writing signed by both parties; that even if that were not so there was an agreement signed by the defendants, and that was a sufficient agreement in writing within s. 4 of the Attorneys and Solicitors Act, 1870; and that the agreement must be referred to the taxing Master for examination.

Pontifex v. Farnham, (1893) 41 W. R. 238, doubted.

ADJOURNED summons by the plaintiff for an order to proceed with accounts and inquiries directed by a foreclosure order made in this action on February 12, 1907. The case is reported on other points, [1907] 1 Ch. 428.

The Master in proceeding with the account adjourned to the judge the question whether the sum of 635*l.* included in the account of the plaintiff, who had acted as solicitor for the defendants in many contentious matters, was a sum due under an "agreement in writing" within s. 4 of the Attorneys and Solicitors Act, 1870, and if so, whether it could be allowed until approved by the taxing officer under that section.

On May 2, 1904, the plaintiff sent to the defendant Mrs. French a letter signed by his firm, Messrs. Cooper & Bake, referring to their account and offering to give detailed particulars, but adding that they gathered that the defendants desired to waive the particulars and agree the amount due. The letter continued as follows: "Upon the basis that you agree the amount and waive the particulars we send you herewith a memorandum for signature

WARRING- by yourself and Major French, and should be glad if you would
TON J. return it to us duly signed."

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On May 4, 1904, Mrs. French wrote to the plaintiff a letter in which she said: "I received your letter yesterday, and will return you the agreement for your costs signed as soon as I get Major French's signature."

On May 30, 1904, she wrote to the plaintiff: "Enclosed is the agreement for your costs as arranged, signed by Major French and myself." In that letter she enclosed the following agreement, which was alleged to be the memorandum referred to in the letter of May 2, 1904:—

"30th May, 1904.

"To Messrs. Cooper & Bake,

"6 and 7, Portman Street, W.

"Gentlemen,—Referring to the account due from ourselves, the undersigned, in respect of professional services rendered and moneys paid, we hereby agree the balance due to you (excluding and in addition to the acceptance for 223*l.* 18*s.* due 30th June next) at 635*l.* (six hundred and thirty-five pounds). And we hereby expressly agree to waive delivery of a detailed account shewing how the amount is made up.

"And we hereby agree to pay the said amount in due course with interest thereon at the rate of five per cent. per annum calculated from the 25th March, 1904.

"Yours, etc.,

"R. French,

"Mary C. French."

The defendant Mrs. French contended that there was no "agreement in writing" within s. 4 of the Attorneys and Solicitors Act, 1870, and this summons was taken out in order to decide that question.

Norton, K.C., and *E. Ford*, for the summons. The onus is on the respondents to shew that the 635*l.* ought not to be paid under the agreement.

Ward Coldridge, for Mrs. French. The applicant ought to deliver a detailed bill of costs to be taxed in the usual way. The work done was contentious, and the agreement is

therefore governed by s. 4 of the Attorneys and Solicitors Act, 1870. Before that Act these special agreements could only be opened in a suit, and the attitude adopted by the Court in reference to them is shewn by *In re Whitcombe*. (1) The present memorandum is not an agreement in writing within the section, as it is signed only by the client. The Court will not read into it the applicant's signature to the letter of May 2, 1904: *Coombs v. Wilkes*. (2) But, assuming that the Court is of opinion that it is a sufficient agreement within the section, then we submit that under the proviso to the section we are entitled to have it examined by the taxing Master. Upon the first point we contend that an agreement under s. 4 of the Act must be in writing and signed both by the solicitor and client: *In re Lewis* (3); *In re Raven* (4); *In re Russell, Son & Scott* (5); *In re West, King, and Adams* (6); *In re Fernandes*. (7)

Bewley v. Atkinson (8) is said to be against our contention, but that was a decision under a different statute, and the words were different. In *In re Frape* (9) it was held that an agreement between solicitor and client need only be signed by the person to be bound thereby, but that was under s. 8 of the Solicitors' Remuneration Act, 1881. The applicant relies chiefly on *In re Jones* (10), in which it was decided that a document signed by the client alone was an agreement in writing within s. 4 of the Act of 1870. In coming to that conclusion, however, North J. said that it was not necessary for him to go through the long course of decisions on the subject, as he was bound by *In re Thompson* (11), in which Pollock B. and Charles J. supported an agreement signed by the client only. But there is another case, *Pontifex v. Farnham* (12), in which the same learned judges came to an exactly opposite conclusion, which was not cited in *In re Thompson* (11) or *In re Jones*. (10) If it had been cited in *In re Jones* (10) North J. would not have felt himself bound by *In re Thompson* (11); he would have gone through all the

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(1) (1844) 8 Beav. 140.

(2) [1891] 3 Ch. 77.

(3) (1876) 1 Q. B. D. 724.

(4) (1881) 45 L. T. 742.

(5) (1885) 30 Ch. D. 114.

(6) [1892] 2 Q. B. 102, 106.

(7) (1878) W. N. 57.

(8) (1879) 13 Ch. D. 283.

(9) [1893] 2 Ch. 284.

(10) [1895] 2 Ch. 719.

(11) [1894] 1 Q. B. 462.

(12) 41 W. R. 238.

WARRINGTON J. authorities, and would probably have held that an agreement must be signed by both parties.

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Even after an agreement has been referred to the taxing officer this Court has jurisdiction under ss. 8 and 9 of the Act of 1870 to decide whether it is fair and reasonable and to set it aside if it is not. That implies an examination of the whole bill. But at present the Court has only to deal with the proviso to s. 4. The solicitor alone has the information on which the agreement can be examined, and he must produce it. The expression "a Court having power to enforce the agreement" means the High Court in matters attached to the High Court. We ask the Court to refer this to the taxing officer and not to force us to adopt the more expensive procedure under ss. 8 and 9.

Norton, K.C., in reply. An agreement under the Act of 1870 need only be signed by the person to be bound thereby, as is expressly enacted in s. 8, sub-s. 2, of the Act of 1881. In *In re Lewis* (1), *In re Raven* (2), and *Pontifex v. Farnham* (3), the decisions were only that there was no completed agreement. *In re Russell, Son & Scott* (4), *In re West, King, and Adams* (5), and *In re Frape* (6), only contain dicta on the subject. But the correspondence in this case shews that there was an agreement signed by both parties.

[He was stopped on this point.]

This agreement ought not to be sent to a taxing officer for examination. Sect. 4 of the Act of 1870 only applies to work done in the action then proceeding; the taxing officer referred to in the proviso is the officer who is taxing the costs of the litigation in which the question arises. This application ought to have been made by motion under ss. 8 and 9 of the Act of 1870, and the Court itself should have been asked, as it would have been before the Act, to decide whether the agreement was fair and reasonable: *Turner v. Hand* (7); *In re Jones*. (8) No method is suggested in s. 4 by which this Court can refer the agreement to the taxing officer, nor are any rules laid down for

(1) 1 Q. B. D. 724.

(2) 45 L. T. 742.

(3) 41 W. R. 238.

(4) 30 Ch. D. 114.

(5) [1892] 2 Q. B. 102, 106.

(6) [1893] 2 Ch. 284.

(7) (1859) 27 Beav. 561.

(8) [1895] 2 Ch. 719.

his examination of it. Sect. 4 has no application to matters which are within ss. 8 and 9. There is no evidence that this agreement is unfair or unreasonable, so it ought to be enforced without taxation : *In re Palmer* (1) ; *In re Frappe*. (2)

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Cur. adv. vult.

June 8. WARRINGTON J. read the following judgment:—The application before me is in form a summons to proceed with the accounts and inquiries directed by an order of February 12, 1907. The action is brought for the purpose of enforcing a number of securities given by the defendant Mary Cassandra French to the plaintiff, and the order mentioned above is an order in common form for foreclosure nisi. The plaintiff is a solicitor, and acted as solicitor for the defendant and her husband in various matters which were not business to which the Solicitors' Remuneration Act, 1881, applies. One of the items claimed by the plaintiff to be due to him from the defendant is a sum of 635*l.* for professional services mentioned in a memorandum of May 30, 1904. The plaintiff relies on this memorandum and certain correspondence as an agreement in writing respecting the amount of his remuneration within s. 4 of the Attorneys and Solicitors Act, 1870. The defendant contends that these documents together do not constitute a sufficient agreement in writing, because, though there are in this case the signatures of both parties, the letters are not, as she says, connected with the memorandum ; and further that the memorandum taken by itself is insufficient, inasmuch as it is not signed by both parties. The defendant further contends that, before the Master can allow the item in question, the agreement, if there be one, must be examined and allowed by a taxing officer.

The first question is whether there is in fact an agreement in writing signed by both parties. The facts material to the question are as follows : [His Lordship read the letters and the memorandum, and continued :—]

It is common ground that the document enclosed in the letter of May 30 was the memorandum of that date. It, in my opinion,

(1) (1890) 45 Ch. D. 291, 298.

(2) [1893] 2 Ch. 284, 295.

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follows that the memorandum signed by defendant is the memorandum enclosed in plaintiff's letter of May 2. The memorandum is in the following terms: [His Lordship read it.] The memorandum is, in my opinion, sufficiently connected with the letter of May 2 by the letters of May 4 and 30, and if so there is a sufficient agreement in writing signed by both parties. But if I am wrong in this, and the document relied on is signed by one party only, viz., the client, I should still be of opinion on the balance of authority that there is an agreement in writing within the statute. The question arose, and was determined in the above sense by a Divisional Court of the Queen's Bench Division, in *In re Thompson* (1), in which the previous cases were cited and reviewed with one exception which I will mention presently. *In re Thompson* (1) was followed by Stirling J. in *In re Jones* (2), the previous cases being again cited with the exception above mentioned. I think I am bound to follow these two decisions. But against this it is said that there was a decision the other way of the same two judges who decided *In re Thompson* (1), and that that decision was not cited to them on the argument of that case, nor to Stirling J. in *In re Jones* (2), and that if it had been cited the decision in *In re Thompson* (1) might have been the other way, or at all events Stirling J. would have had before him two conflicting decisions by the same judges, and would not have been bound by *In re Thompson*. (1) The decision in question was given in *Pontifex v. Farnham*. (3) This is a most unsatisfactory case. I think the real ground of Pollock B.'s judgment, and a sufficient ground for the decision, was that the letters in that case, independently of the fact that they were signed by one party only, were not a sufficient agreement. Charles J., it is true, does say that signature by both parties is necessary, but this was not required to support the decision, and it is open, therefore, to the same adverse criticism to which the case of *In re Lewis* (4) was subjected by the learned judge himself in *In re Thompson* (1), and by Thesiger L.J. in *Bewley v. Atkinson*. (5) On the whole I

(1) [1894] 1 Q. B. 462.

(3) 41 W. R. 238.

(2) [1895] 2 Ch. 719.

(4) 1 Q. B. D. 724.

(5) 13 Ch. D. 283, 299.

think *Pontifex v. Farnham* (1) does not diminish the combined authority of *In re Thompson* (2) and *In re Jones*. (3) The memorandum is therefore an agreement in writing within s. 4 of the Attorneys and Solicitors Act, 1870. The question then arises, Ought the sum mentioned therein to be allowed as due until the agreement has been examined and allowed by a taxing Master?

If this sum is included in the amount due on the security, then, on the certificate becoming binding, that sum would without further orders be receivable by the plaintiff as a term of redemption; and the effect of working out the order would, in my opinion, be that the amount would in either case be received in cash if the defendant redeems, and by the plaintiff's receiving the security freed from the equity if she makes default. I am of opinion that this at all events is a case in which the agreement ought at once, without any further application under s. 8 or otherwise, to be sent to the taxing Master for his examination, pursuant to s. 4. Coming as I do to the conclusion that this is a case to which s. 4 applies, it is unnecessary to consider, and I do not determine, whether there are or are not cases, as, e.g., where there are no pending proceedings in which the agreement comes in question, in which ss. 8 and 9 must be resorted to to the exclusion of s. 4. I must therefore declare that the plaintiff has made an agreement in writing with the defendant within the meaning of the Attorneys and Solicitors Act, 1870, the terms of which agreement are expressed in the memorandum of May 30, 1904, but that, before including the amount payable under such agreement in the sum to be found due to the plaintiff, the said agreement must be examined and allowed by the taxing Master, pursuant to s. 4 of the Act.

The costs of this application ought to be costs in the action.

Solicitors: *Cooper & Bake; Fowler & Co.*

(1) 41 W. R. 238.

(2) [1894] 1 Q. B. 462.

(3) [1895] 2 Ch. 719.

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[1905 B. 2735.]

*April 24, 25, Deed—Misrepresentation as to Character of Deed—Plea of non est factum—
26; May 16. Validity—Plea Good as to Part of Deed.*

A married woman entitled to a reversionary interest was induced by her husband to execute a document which he represented to be a power of attorney enabling him to raise money at some future time. It was in fact a mortgage of a reversionary interest to which she was entitled for 12,000*l.* containing a personal covenant for payment by the wife. The wife knew that if her husband did eventually raise money under the document it would be raised out of her reversionary interest. She did not intend to create a present charge or incur any personal liability. The mortgagees brought this action against the husband and wife for foreclosure and judgment in their covenants. The wife pleaded, among other defences, “non est factum” :—

Held, that the husband’s misrepresentation was as to the nature and character of the deed, and the plea was good as to the whole deed, and that, even if the charge on the wife’s reversionary interest were valid, the defence ought to prevail as to her covenant to pay principal and interest.

Howatson v. Webb, [1907] 1 Ch. 537, distinguished.

ON October 18, 1895, Mrs. Chapman and her husband executed a mortgage in favour of the plaintiffs of a reversionary interest to which Mrs. Chapman was entitled for securing 12,000*l.* and interest. The deed contained covenants by the husband and wife for payment of principal and interest. This action was brought by the plaintiffs for foreclosure and judgment against Mrs. Chapman and her husband, personally, on their covenants. Mrs. Chapman, among other defences, put in a plea of “non est factum.” The husband did not appear.

Mrs. Chapman was married on January 14, 1891, being then an infant. Under the will of her great-grandfather, William Bayne, she was entitled, on attaining twenty-one, to one-fourth of his residuary estate, about 60,000*l.*, nearly all invested in Consols, in possession, and to one-third of another fourth in reversion expectant on the death of a lady over sixty years of age. Her husband was a solicitor about sixteen years older

than herself. He had been her father's solicitor, and was a trustee of his will. She attained twenty-one on August 11, 1891, and shortly afterwards, at her husband's request, signed a power of attorney in his favour authorizing the sale of her Consols. Some time before the date of the mortgage all the Consols had been sold and transferred under this power and most of the proceeds lost in speculation, but of this Mrs. Chapman was not aware. Her husband induced her to execute the mortgage deed by representing that it was a document which would enable him to raise money at some future time if he should require it; but he said he was not going to use it, and she should not suffer. She understood that if her husband did raise money it would be out of the reversionary interest, but she had no idea that any present charge was created, or that she was making herself personally liable to pay anything. She had no business experience and no independent advice. She did not read the document, nor was it read to her. Her husband received the 12,000*l.* from the mortgagees immediately after the execution of the mortgage, but she had none of the money.

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Levett, K.C., and *Austen-Cartmell*, for the plaintiffs, the mortgagees. We put in the mortgage, which has no receipt indorsed on it. The onus is on the defendant Mrs. Chapman to prove her plea of "non est factum" or to prove repayment.

Upjohn, K.C., and *Manning*, for Mrs. Chapman. The wife was told that the deed was a power of attorney to enable her husband to raise money on the share, if necessary, at some future time. That is a misrepresentation, not of the effect of the deed, but of its nature and actual contents; such a misrepresentation will clearly support a plea of "non est factum": *Thoroughgood's Case* (1); *Kennedy v. Green* (2); *National Provincial Bank of England v. Jackson* (3); *Edwards v. Brown* (4); *Foster v. Mackinnon*. (5) Even if it can be proved that the wife realized that the writing affected her reversionary interest in the property, but did not know of the personal covenant, that covenant was

(1) (1582) 2 Rep. 9a.

(3) (1886) 33 Ch. D. 1, 10.

(2) (1834) 3 My. & K. 699, 718.

(4) (1831) 1 C. & J. 307, 312.

(5) (1869) L. R. 4 C. P. 704, 711.

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not her deed, and the mortgage is void so far as that covenant is concerned: see *Pigot's Case* (1); and this is borne out by Comyns' Digest, tit. Fait B 2, vol. iv., "If two deeds are on the same parchment and the one is truly read, and the other falsely, it binds for the deed which was truly read. . . . So if there are two distinct clauses in the same deed, and one is truly read, and the other not, it shall be good as to the one."

Levett, K.C., in reply. The case of *Howatson v. Webb* (2), recently before Warrington J., is a clear authority that a misrepresentation as to the contents of a deed is not enough to support a plea of "non est factum." There must be a misrepresentation as to its character. This case is much stronger than *Howatson v. Webb*. (2) The lady knew that the document affected this particular property, and that it was to enable her husband to raise money.

Upjohn, K.C., in reply as to *Howatson v. Webb*. (2) The facts of that case are quite distinguishable. There it was represented to the defendant that the deed transferred the property in question; there was no such representation here. Warrington J. appears to have held that the plea of "non est factum" would not apply to the covenant unless it applied to the whole deed, but *Pigot's Case* (1) was not cited to him.

May 16. SWINFEN EADY J. The plaintiffs in this action seek to enforce a mortgage for 12,000*l.*, which they claim was executed by the defendant Mrs. Chapman in their favour, upon her reversionary interest in a sum of about 20,000*l.*, under the will of her great-grandfather, William Bayne, expectant upon the decease of Miss Isabella Bayne, a lady over sixty years of age. They also claim judgment against Mrs. Chapman personally upon a covenant contained in the deed. Mrs. Chapman's husband, John Mitchel Chapman, is also a defendant, but he has not appeared in the action. Mrs. Chapman disputes the validity of the deed and also its effect. She was born on August 11, 1870. Her father died before she was nineteen. On January 14, 1891, while still an infant, she married the

(1) (1614) 11 Rep. 26b, 27b.

(2) Cited from the proof, since reported, [1907] 1 Ch. 537.

defendant John Mitchel Chapman. He was a solicitor, and some sixteen years older than the lady. He was an old friend of the family, had been her father's solicitor, and was a trustee of her father's will. She became entitled at twenty-one to one-fourth share of the testator's estate, which fourth amounted to about 60,000*l.*, almost wholly invested in Consols. She also had a contingent reversionary interest in one-third of another fourth, subject to Miss Isabella Bayne dying without leaving any child. No settlement was made upon her marriage, nor was one suggested by her future husband. In August, 1891, she came of age. Upon her coming of age, her husband asked her to sign a document, saying it would be easier to arrange for the housekeeping expenses and dress allowance which he would pay her, namely, 1000*l.* a year. The document then signed by her is not dated, but must have been signed on or before September 24, 1891. It was a power of attorney, authorizing the sale of the whole of the 58,103*l.* 3*s.* 6*d.* Consols then standing in her name. It was acted upon, first, on September 24, 1891, when there was a transfer of 10,000*l.* Consols, and by January 11, 1892, the whole of the 58,103*l.* 3*s.* 6*d.* Consols had been sold and transferred. Apparently much of this money was lost by her husband in speculation; but she was not aware of it, as he always refused to discuss business affairs with her at all. In 1895 Mrs. Chapman still had left her reversionary interest in the 20,000*l.*, but she had not any means or property of her own in possession, and her signature to the deed in dispute was obtained under the following circumstances. Her husband asked her "to sign a paper" because it might make things easier for him in case he should require any money later, but he said he was not going to use it and that she should not suffer. She stated that she did not think that she read the document, or that anyone read it to her. She had not any solicitor acting for her. She had had no experience of business. She signed the document to help her husband if he should require money. Nothing was said about her becoming liable to repay any money her husband had. She thought she was signing some document to enable her husband to obtain money if he required it—not then, but in the future. She did not receive the 12,000*l.* mortgage money or

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any part of it, nor any benefit from the advance. After signing she heard nothing further about the document for some years, and thought that her husband had not touched or used the money which she might have given him the power to raise. In cross-examination she stated that it was not suggested to her that the 20,000*l.* should be mortgaged; that she thought she was signing something to enable Chapman to raise money at some future time; that he told her he was not going to use it; but that she did understand that, if her husband raised any money, it was to be raised out of Miss Bayne's money. The proper inference of fact to be drawn from the defendant's evidence is that she understood, from the statement made to her, that the document she was asked to sign was a document to enable her husband at some future time, if necessity arose, to create some charge upon her reversionary interest; that it was in the nature of what lawyers call a power of attorney, similar to the document or power of attorney which she had previously signed relating to her Consols; that the document to which her signature was obtained was of a different nature and character from that which she thought she was signing; and that she had no idea that the document was or purported to be an immediate mortgage of her reversionary interest for 12,000*l.*, or that such deed also contained a covenant binding her personally to pay 12,000*l.* Not only had she no knowledge or suspicion that any immediate charge was created, or that the deed actually dealt in any way with her property, but I am also satisfied that she had no intention of executing any document imposing any personal liability upon herself, and that she believed the document to be a power of attorney enabling her husband at a future time to deal with her reversionary interest, but not enabling him to put her under any personal liability. In other words, she was induced by her husband to believe that the document was only an authority to deal in the future with her reversionary interest, but not to subject her to any personal liability. It appears from the evidence that Mrs. Chapman's husband was also acting as solicitor for the plaintiffs, the Bagot trustees, in the matter of the mortgage, and that the consideration money of 12,000*l.* was paid to him by a cheque of his firm, Chapman, Corbould & Dunster, signed by

himself and Mr. Dunster as drawers. Under these circumstances, and without considering the other grounds of defence urged, I am of opinion that the deed is not binding upon the defendant Mrs. Chapman, as, upon the issue of non est factum, it must be determined that the deed is not her deed. It is well settled that where a person is induced to execute a deed by a false representation as to the nature and character of the document he is signing—where the document is of a totally different character from what he was told it was—such a deed does not bind him: see *Thoroughgood's Case* (1); *Kennedy v. Green* (2); *Foster v. Mackinnon* (3); *National Provincial Bank of England v. Jackson*. (4) The present case is different from the recent case of *Howatson v. Webb* (5), where the grantor was told that the deeds signed by him related to the property to which they did relate, and were deeds transferring that property, and his mind was applied to the question of dealing with that property.

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A further question arises in the present case whether a plea of "non est factum" can be sustained as to so much of the deed as relates to the covenant by Mrs. Chapman to pay the mortgage debt and interest, even if the plea were to fail as regards so much of the deed as contains the charge upon her reversionary interest. In effect there are two deeds upon the same parchment; these were formerly comprised in separate instruments, a bond usually accompanying a mortgage, but the modern practice is for a covenant to pay to be comprised in the mortgage deed, and a bond is not taken.

A mortgage usually implies a debt, but only a simple contract debt, unless there be a bond or covenant for the payment of the money. In *Duke of Ancaster v. Mayer* (6) Lord Thurlow said: "A man mortgages his estate without covenant, yet, because the money was borrowed, the mortgagee becomes a simple contract creditor, and, in that case, the mortgage is a collateral security, and if there is a bond or a covenant, then there is a collateral security of a higher species, but no higher by means of the

(1) 2 Rep. 9a.

(2) 3 My. & K. 699.

(3) L. R. 4 C. P. 704.

(4) 33 Ch. D. 1.

(5) [1907] 1 Ch. 537.

(6) (1785) 1 Bro. C. C. 454, 464,
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mortgage merely." See also *Quarrell v. Beckford* (1); *King v. King* (2); Robbins on Mortgages, pp. 9, 10. It was urged on behalf of the plaintiffs that, if the plea of "non est factum" is to succeed, the deed must be wholly, and not partly, void, and the recent case of *Howatson v. Webb* (3), before Warrington J., was referred to in support of that proposition. The law is, however, thus stated in Comyns' Digest, tit. Fait B 2, vol. iv.: "If two deeds are on the same parchment, and the one is truly read, and the other falsely, it binds for the deed which was truly read." See also *Pigot's Case* (4), where it is said: "If three distinct bonds are wrote upon one piece of parchment, and one of them only is read to the obligor, and he being a man not lettered, seals and delivers this deed, it is good for that which was read, and ab initio void for the others." And again: "In 9 Henry V., folio 15a, one brought a writ of debt of 20*l.* against another, and declared upon a bond of the same sum; the defendant pleaded that he was a layman, and could not read, and that he acknowledged to be bound to the plaintiff by the same deed in 20*s.*, which he has paid, and shewed an acquittance thereof; and as to the remnant of the sum in the said bond, it was not his deed; and it was held a good plea: which case being of one entire sum proves without question, that if there are two absolute and distinct clauses in a deed, and the one is read to the party not lettered, and the other not, that the deed is good for the clause which was read, and ab initio void for the residue." These authorities establish that, where there are two deeds on the same parchment, one may be good and the other void; and this rule may properly be applied, if the facts warrant it, to a charge upon property and a covenant to pay contained in the same parchment. In the present case it is quite clear that Mrs. Chapman was never asked to incur any personal liability, and had no intention whatever of doing so, or of authorizing her credit to be pledged in any way, and, even if the charge upon her reversionary interest were valid and binding upon her, I should still hold that her defence of non est factum ought to prevail as regards the covenant in the deed to pay principal and interest.

(1) (1816) 1 Madd. 269, 278.

(2) (1735) 3 P. Wms. 358.

(3) [1907] 1 Ch. 537.

(4) 11 Rep. 27b.

The result is that the action fails and must be dismissed. Costs will follow the event. There will be judgment against defendant J. M. Chapman on his covenant.

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Solicitors: *Drake, Son & Parton ; Corbould, Rigby & Co.*

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Landlord and Tenant—Lease—Licence to assign—Unreasonably withheld—Condition imposing increased Rent—“Fine or Sum of Money in the Nature of a Fine”—Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 2, sub-s. 9—Conveyancing and Law of Property Act, 1892 (55 & 56 Vict. c. 13), s. 3—Declaratory Judgment—Costs.

The lessee of a hotel, who had covenanted not to assign without the lessor's consent unless “unreasonably withheld,” asked permission to assign to a certain brewery. The lease had twelve years to run.

The lessor, who entertained a strong opinion that a brewery tie would depreciate the value of the hotel, gave an unconditional consent to the assignment to a private person who would carry on the business as a free house, and added, “but if you desire to assign the tenancy to a brewery firm, then the rent must be increased by twenty-five pounds (25*l.*) per annum and the term extended from twelve to twenty-one years.”

His sole object in imposing these conditions was to recoup himself for the depreciation that would be caused by the tie :—

Held, that the demand of an increased rent as a condition for consenting to an assignment to a brewery was a demand of a “fine or sum of money in the nature of a fine,” and, being as such directly contrary to the proviso precluding any such demand imported into the lease by s. 3 of the Conveyancing Act, 1892, was unreasonable. The consent had therefore been “unreasonably withheld,” and the lessee was entitled to assign to the brewery without further consent.

Held also, that the lessee, having no cause of action against the lessor for unreasonably withholding his consent, was not entitled to the costs of an action to obtain the above declaratory judgment.

WITNESS ACTION.

By a lease dated April 8, 1905, in consideration of the sum of 200*l.* paid by the lessee to the lessor, and of the rent, covenants and conditions therein reserved and contained, the lessor demised the London Hotel, Abergavenny, and adjoining premises to the

SWINFEN lessee for a term of fourteen years from December 25, 1904, at
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1907 by will) "assign transfer underlet or part with the possession of
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v. lessor unless such consent shall be unreasonably withheld."
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The lease contained a clause of re-entry on breach of covenants.

Towards the end of 1906, when the lease had twelve years to run, the lessee was seeking the lessor's permission to assign to a certain brewery company, but the lessor was unwilling to have the house tied to any brewery.

On Monday, December 17, 1906, after certain interviews on the subject, the lessee wrote to the lessor: "With regard to our interview of last Friday I am not quite clear as to the result of same and should be obliged if you would be good enough to enlighten me on the matter. Do I understand that you will give your permission to sell or let the 'London' to a private party, or do you refuse? Also on what conditions may I sell to a brewer, or do you absolutely refuse to have your house tied?"

On December 18, 1906, the lessor replied: "Your letter to hand. You may let the London Hotel to any brewer at 125*l*. per year for at least twenty-one years' lease or more."

On December 18, 1906, the lessee wrote again: "I am obliged for yours of this evening, but beg to draw your attention to the fact that you did not answer my first question."

On December 22, 1906, another interview took place, and the lessor signed and gave the lessee the following memorandum: "I hereby agree to an assignment of the lease or to a sublet on an annual tenancy of the London Hotel upon the present terms to a private person only who will carry on the business as a free house, but if you desire to transfer the tenancy to a brewery firm then the rent must be increased by twenty-five pounds (25*l*.) per annum and the term extended from twelve to twenty-one years."

On January 28, 1907, after some correspondence with the lessee's solicitors, who were trying to obtain less onerous terms for the consent to the assignment to the brewery company, the

lessor wrote finally to the lessee's solicitors: "I shall not consent to have this house let to brewers without I have my terms, as I know all houses as spoilt by been tied" (*sic*).

The lessee thereupon brought this action for a declaration that the lessor was not entitled to impose any such terms as a condition for giving his consent to the assignment to the brewery company, and that the lessee was entitled to assign the lease to the brewery company without any further consent.

The lessor called evidence to shew that a brewery tie would depreciate the goodwill of the hotel besides rendering the licence far more likely to be referred for compensation. The market value of the hotel if tied would be depreciated by 500*l*. For this reason, though perfectly willing to consent to an assignment to any private person, he was unwilling to consent to an assignment to a brewery, unless they took a new lease for an extended term at an increased rent to recoup him for the depreciation and risk of having the licence referred. A suggestion that he might take a lump sum in lieu of increased rent had been made, but it came to nothing.

Eve, K.C., and *James Corner*, for the lessee. The demand of an increased rent as a condition for assenting to the assignment to the brewery company is the demand of a fine contrary to the Conveyancing Act, 1892, s. 3, which provides that "In all leases containing a covenant, condition, or agreement against assigning, underletting, or parting with the possession, or disposing of the land or property leased without licence or consent, such covenant, condition, or agreement shall, unless the lease contains an expressed provision to the contrary, be deemed to be subject to a proviso to the effect that no fine or sum of money in the nature of a fine shall be payable for or in respect of such licence or consent;" Under the Conveyancing Act, 1881, s. 2, sub-s.(ix.), "Fine includes premium or fore-gift, and any payment, consideration, or benefit in the nature of a fine, premium, or fore-gift."

The increased rent is clearly in the nature of a fine, as the lessor will get the benefit, and it will practically come out of the pocket of the lessee, who will get less purchase-money from the

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brewery company: *Waite v. Jennings*. (1) The condition imposed being directly contrary to the proviso imported into the lease by the Conveyancing Act, 1892, is unreasonable, and the consent asked for has been unreasonably withheld. The lessee can therefore assign without further consent, and is entitled to a declaratory order to that effect.

Micklem, K.C., and *T. T. Methold*, for the lessor. There is no covenant that the consent shall not be unreasonably withheld. If unreasonably withheld, the lessee can assign without consent: *Treloar v. Bigge* (2); but she has no right of action against the lessor.

[SWINFEN EADY J. She is entitled to ask for a declaratory order.]

The lessor's attitude was perfectly reasonable. He was not bound to allow his property to be depreciated by a tie, and in effect he absolutely refused to consent to the assignment of the existing lease as it stands to any brewery. If, however, the lessee, who was anxious to get rid of the lease, could not find a private assignee, the lessor was willing to help her by granting a fresh lease to any brewery for an extended term at a higher rent. This is merely an alternative offer, and is in no sense a conditional consent to the assignment of the existing lease to a brewery. That consent was really refused, and the only question is whether the refusal was reasonable. The alternative offer did not constitute the imposition of a fine within s. 3 of the Conveyancing Act, 1892, and that section is really inapplicable.

SWINFEN EADY J., after stating the facts and reading the correspondence, continued:—The result of the evidence really comes to this. The lessor in effect says to the lessee, "I will consent to your assigning to a brewer upon the rent being increased from 100*l.* to 125*l.* and the term being extended from twelve to twenty-one years, but I will not consent on any other terms, and on these terms I consent to your selling to the proposed brewery, or to any other brewery."

Now it may well be that, regarding the matter from the lessor's point of view, he was justified in imposing these terms. The

(1) [1906] 2 K. B. 11, 18, 19.

(2) (1874) L. R. 9 Ex. 151.

house might be deteriorated in value by an assignment to a brewer. That is to say, if the house were carried on as a tied house instead of a free house the trade might diminish. It would depend very much on the brewers who carried it on. The proposed assignees, according to the evidence, appear to be brewers of good repute and good credit in the neighbourhood, who manage their houses well, and it is quite possible that the trade under their management might even increase rather than diminish, notwithstanding the tie. In many cases a tie might have the effect of depreciating the value, and, speaking generally, a tied house would be of less value than a free house. The lessor from his point of view was not acting in a manner which was unjustified; he was not, for instance, endeavouring to confiscate the lessee's improvements. But the question is whether he was acting legally. He did not refuse to consent to an assignment to any brewer. He offered to consent, but stipulated for a money consideration. Now, the Conveyancing Act, 1892, s. 3, contains this provision: "In all leases containing a covenant, condition, or agreement against assigning, underletting, or parting with the possession, or disposing of the land or property leased without licence or consent, such covenant, condition, or agreement shall, unless the lease contains an expressed provision to the contrary, be deemed to be subject to a proviso to the effect that no fine or sum of money in the nature of a fine shall be payable for or in respect of such licence or consent;"

The lease in question does not contain any expressed provision to the contrary. The consequence is that I am bound by the statute to read this lease as if it contained a proviso that no fine or sum of money in the nature of a fine shall be payable for or in respect of such licence or consent. Now, that being the effect of the lease, the lessee applies for a licence to assign the lease to a brewer; the lessor says, "I will consent upon payment of an increased rent." Then he is met with the difficulty that the lease says that no fine or sum of money in the nature of a fine shall be payable in respect of such licence or consent. Is it reasonable to stipulate that an increased rent shall be paid when the lease contains that proviso? Is this increased rent

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either a fine or sum of money in the nature of a fine? I am of opinion that it is. It is a sum of money which, if it were paid, the lessor would receive over and above the rent reserved on the lease. There was some suggestion that instead of paying the additional 25*l.* a year a lump sum would be accepted; but, without laying stress upon that, in my opinion the stipulation contained in the memorandum of December 22, 1906, increasing the rent by 25*l.* per annum, is a stipulation for a sum of money in the nature of a fine or premium payable to the lessor for his consent in allowing the lessee to assign the lease to a brewery company.

When once that conclusion is arrived at, the proposition is reduced to this—is it reasonable for a lessor to ask for a fine when the lease contains a provision that no sum of money in the nature of a fine shall be payable in respect of his consent? It is really acting directly contrary to the stipulations contained in the lease, and, in my opinion, the lessor is not acting reasonably in stipulating for something as a condition of granting his consent which the lease itself says he is not to have.

I do not lay any stress upon the term being extended. Obviously the extended term was to be at the increased rent. No question arises with regard to the term, except in connection with the increased rent. The lessor explained that his object in increasing the term was to have the increased rent for a longer period, in order to recoup himself for any possible deterioration in value. Under these circumstances I must come to the conclusion that the lessor, in ignorance of the statutory proviso, was asking for something which the statutory proviso does not allow him to stipulate for, and that was the only condition that he imposed for his consent. Upon a monetary condition being complied with, and the term extended from twelve to twenty-one years—that is to say, giving him the money for a longer term—he was willing to consent. There was no question of any particular brewery. He consented to an assignment to any brewer, subject to a stipulation which the statutory proviso does not allow, and, therefore, I must hold that the stipulation was an unreasonable condition. It follows that, the lessor having unreasonably withheld his consent, the lessee is now entitled to

assign to the brewery company without any further consent on the part of the lessor : *Treloar v. Bigge*. (1)

Then the question arises with regard to the costs of the action. On the one hand, the lessee seeks a declaratory judgment, but she does not claim any other relief against the lessor. There is no covenant by him to give a consent; it is only this, that if he unreasonably withholds his consent then she is entitled to assign. An unreasonable refusal releases the restriction against assigning, but it gives her no cause of action against the lessor. Therefore, although she is entitled to a declaration, *prima facie* she would not be entitled to recover the costs of the action. On the other hand, the lessor has disputed the right she claims, and, as his defence on that point fails, I cannot give him any costs. I think, therefore, the proper order will be a declaration that in the events that have happened the lessee is entitled to assign to the brewery company without any further consent on the part of the lessor, and that each party bear their own costs of the action.

Solicitors : *A. R. & H. Steele, for Gabb & Walford, Abergavenny ; Hier Jacob, for J. R. Jacob, Abergavenny.*

(1) L. R. 9 Ex. 151.

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[1906 H. 2168.]

CLIFFORD v. TIMMS.

[1906 C. 2818.]

CLIFFORD v. PHILLIPS.

[1906 C. 2970.]

Evidence—Admissibility—Judgment in rem—Order of General Medical Council erasing Name from Dentists' Register—Report of Dental Committee—Partnership—Construction of Articles—"Professional Misconduct"—Dentist—Dentists Act, 1878 (41 & 42 Vict. c. 33), ss. 13, 14, 15.

Three several articles of partnership for carrying on the business of dentists, entered into by two persons named Clifford with the plaintiff in the first action and the defendants in the other two actions, all contained a provision that if either partner should be guilty of "professional misconduct" the other partner should be at liberty to give notice in writing determining the partnership. On May 24, 1906, the General Medical Council, acting under the powers of the Dentists Act, 1878, made an order directing the registrar to strike the Cliffords' names off the Register of Dentists, on the ground that they had been guilty of conduct "which was infamous or disgraceful in a professional respect" within the words of the Act. The plaintiff in the first action and the defendants in the other two actions thereupon gave notices determining the partnership. These three actions were brought to determine the validity of the notices. The order of the Medical Council was tendered in evidence. Warrington J. rejected it, and decided all three actions in favour of the Cliffords (see *Clifford v. Timms*, [1907] 1 Ch. 420):—

Held by the Master of the Rolls and Buckley L.J., that the order was admissible as prima facie evidence of the fact that the Cliffords were guilty of acts "infamous or disgraceful in a professional sense," and there being no rebutting evidence, that fact was proved.

Held by the President, that the order was admissible as evidence and conclusive evidence of the fact that the defendants' names had been erased from the register by order of the council, and might be admissible against the defendants for some purposes other than the truth of the fact of misconduct to show the grounds upon which it was made, and that there was other sufficient evidence that the Cliffords had been guilty of professional misconduct.

Held by all three judges, that no distinction could be drawn between

“professional misconduct” in the deeds and “conduct infamous or disgraceful in a professional respect” in the Act, and that all three appeals must be allowed.

THE question to be decided in each of these cases was whether notices given by the plaintiff in the first case and the defendant in each of the others to Isidore Clifford and Ruby E. Clifford, the defendants in the first case and the plaintiffs in the other two, to determine partnerships in the business of dentists between themselves and the Cliffords or one of them on the ground of their professional misconduct were valid. The only point argued which requires a report was whether an order of the General Medical Council made under the Dentists Act, 1878, erasing the names of the Cliffords from the Dentists’ Register on the ground that they had been guilty of conduct “infamous or disgraceful in a professional respect,” and the report of the statutory committee upon which it was founded, were admissible in evidence to prove “professional misconduct.”

The case of *Clifford v. Timms* was heard first before Warrington J. (1), but the case of *Hill v. Clifford* came first before the Court of Appeal and was argued on May 14 and 15. The facts in *Hill v. Clifford* were as follows :—

By an indenture dated October 18, 1905, and made between Isidore Clifford of the first part, Ruby Edmund Clifford of the second part, and Herbert Frederick Hill of the third part, it was agreed that the profession or business of dentists should as from June 30, 1905, be carried on by the said R. E. Clifford and H. F. Hill as partners until September 30, 1913, determinable as thereafter mentioned, under the name of Dr. H. F. Hill. Clause 8 provided that the business should be under the general management and control of H. F. Hill, and that he should devote his whole time and attention to the business. R. E. Clifford was not bound to give any assistance in the business, but had power to take such part therein as he should think fit and to attend to any patient.

Isidore Clifford was not made a partner, but the deed provided that in the event of the death of R. E. Clifford during the partnership Isidore Clifford should take his place and share.

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The deed also contained provisions for the purchase of the share of either partner who should die during the partnership, and the following clauses.

Clause 20. "If either of them the said R. E. Clifford or H. F. Hill or in case of the decease of the said R. E. Clifford in the lifetime of the said H. F. Hill the said Isidore Clifford shall at any time during the continuance of these presents be guilty of professional misconduct or of any act which is calculated to bring discredit upon or injure the business or be obstructive or contumacious therein or if he shall commit a breach of any of the clauses herein contained or act contrary to the good faith which ought to be observed between the said R. E. Clifford or Isidore Clifford and H. F. Hill or shall be adjudicated bankrupt or if a receiving order be made against him or he shall become incapable by reason of lunacy or otherwise to take his part in the management as the case may be of the business then and in either of such cases either of the other of them may by notice in writing given to the party so offending or becoming bankrupt or lunatic or against whom a receiving order be made as aforesaid determine these presents as from the date of such notice then and in such case the provisions of these presents shall apply in the same manner in all respects as if the party so offending or becoming bankrupt or becoming incapable by lunacy or otherwise or against whom a receiving order be made had died on the day of such notice save and except that nothing shall be paid by the continuing partner in respect of the share of the expelled party in the business other than his share of the surplus of assets of the business over the liabilities of the business and his share of the profits of the business to the day of the determination of these presents."

The business contemplated by the deed was carried on between the plaintiff and R. E. Clifford until June 19, 1906, when a notice in the following terms was given by the plaintiff to R. E. Clifford: "Take notice that in consequence of your having been guilty of professional misconduct or acts calculated to bring discredit or injury upon the business in pursuance of clause 20 of (the partnership deed) I hereby determine as from this date the said indenture."

The defendants asserted that the said notice was inoperative to determine the indenture, and on July 18, 1906, the plaintiff commenced his action to obtain a declaration that the said notice was a valid notice and the partnership was thereby duly determined, for the necessary accounts to be taken, and for consequential relief.

The facts proved or admitted at the trial were that the defendants had joined with other persons in forming, and were directors and some of the shareholders in, a company called the American Dental Institute, Limited, for the purpose (inter alia) of promoting the adoption of advanced American and other scientific methods of dental surgery. The company had employed unregistered assistants to attend to patients and perform dental operations. Some of these persons had used the title of "doctor." The company had also published certain advertising pamphlets which were alleged to be of an objectionable character. On the ground of these acts the British Dental Association made complaint to the General Medical Council, who, acting under the Dentists Act, 1878, appointed a committee to examine into the matter, and, after receiving their report, made an order directing the registrar to erase from the dentists' register the names of the defendants R. E. Clifford and Isidore Clifford on the ground that they had been guilty of conduct which was "infamous or disgraceful in a professional respect" within s. 13 of the Act.

This order and the report of the committee on which it was based were tendered in evidence by the plaintiff and admitted *de bene esse*, but at the trial Warrington J. decided that they were inadmissible, and dismissed the action with costs. The plaintiff appealed. (1)

(1) The provisions of the Dentists Act, 1878, affecting the question are the following:—

Sect. 2: "In this Act 'General Council' means the General Council of Medical Education and Registration of the United Kingdom, established under the Medical Act, 1858" (21 & 22 Vict. c. 90).

Sect. 3: "From and after August 1, 1879, a person shall not be entitled to take or use the name or title of 'dentist' (either alone or in combination with any other word or words), or of 'dental practitioner,' or any name, title, addition, or description implying that he is registered under this Act or that he is a person

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Buckmaster, K.C., and *Ward Coldridge*, for the appellant. The issue before the Court is whether Ruby Clifford has been guilty of "professional misconduct." What better evidence of misconduct of this character can be produced than the finding of the Medical Council? The order of the Medical Council, the report of the committee on which it was founded, and the report of the proceedings before the committee are admissible in evidence in this action as proof of such misconduct. The order of the Medical Council is equivalent to the finding of a Court having jurisdiction in this matter, and is conclusive evidence: *Geyer v. Aguilar* (1); *Philips v. Bury*. (2) The effect of the erasure of the defendant's name from the register prevents him from recovering fees and holding himself out as a dentist: Dentists Act, 1878, s. 5. The order is conclusive evidence of the

specially qualified to practise dentistry, unless he is registered under this Act." (The section also imposes penalties for breach of its provisions.)

Sect. 5: "A person registered under this Act shall be entitled to practise dentistry and dental surgery in any part of Her Majesty's Dominions, and from and after August 1, 1879, a person shall not be entitled to recover any fee or charge, in any Court, for the performance of any dental operation or for any dental attendance or advice, unless he is registered under this Act or is a legally qualified medical practitioner."

Sect. 13: "... Where a person registered in the dentists' register has, either before or after the passing of this Act, and either before or after he is so registered, been convicted either in Her Majesty's Dominions or elsewhere of an offence which, if committed in England, would be a felony or misdemeanor, or been guilty of any infamous or disgraceful conduct in a professional respect,

that person shall be liable to have his name erased from the register.

"The General Council may, and upon the application of any of the medical authorities shall, cause inquiries to be made into the case of a person alleged to be liable to have his name erased under this section, and, on proof of such conviction or of such infamous or disgraceful conduct, shall cause the name of such person to be erased from the register. . . ."

Sect. 15: "The General Council shall for the purpose of exercising in any case the powers of erasing from and of restoring to the dentists' register the name of a person or an entry, ascertain the facts of such case by a committee of their own body, not exceeding five in number, of whom the quorum shall be not less than three, and a report of the committee shall be conclusive as to the facts for the purpose of the exercise of the said powers by the General Council. . . ."

(1) (1798) 7 T. R. 681.

(2) (1788) 2 T. R. 346.

fact that the name has been so erased; and it is also evidence of the fact of professional misconduct, just in the same way as an order in lunacy is admissible as *prima facie* evidence, if uncontradicted, of insanity: *Harvey v. Rex*. (1) The report is admissible in evidence as forming part of the order and enabling it to be understood. The shorthand notes of the proceedings before the council are also admissible: these notes are embodied in the official publication of the Medical Council; they contain statements made by the defendant's counsel on his behalf, which amount to admissions on his part of professional misconduct. The nature and jurisdiction of the Medical Council was considered in *Allbutt v. General Council of Medical Education and Registration* (2), where it was held that their findings in a matter of this kind could not be reviewed.

[COZENS-HARDY M.R. referred to *Allinson v. General Council of Medical Education and Registration*. (3)]

The report and account of proceedings before a body of this kind must be admissible to shew that a person subject to the control of this body has been guilty of professional misconduct within the meaning of clause 20 of this partnership deed entered into between two persons both engaged in the same profession and responsible to the same governing body.

H. Terrell, K.C., and *A. Houston*, for the respondent. Neither the report of the committee nor the order of the council, being *res inter alios acta*, are admissible in evidence against the defendant in this action. The order of the council is evidence that this defendant is not on the register, but it is not evidence of professional misconduct. It is in no sense a judgment *in rem*; it does not alter the status of the defendant, or prevent him from practising, though he may not call himself a dentist or sue for fees. The order of the council is conclusive as to the fact of the removal from the register. But it is no evidence of the alleged facts upon which the order was founded. Those facts were not even ascertained by the council, but by a committee, which is a totally different body.

(1) [1901] A. C. 601.

(2) (1889) 23 Q. B. D. 400.

(3) [1894] 1 Q. B. 750.

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[SIR GORELL BARNES, PRESIDENT, referred to *Reg. v. Inhabitants of Hartington Middle Quarter*. (1)]

There it was held that a decision as to the settlement of children was conclusive as to the settlement of their parents in a case between the same parties, in which the question depended on the same facts as were necessary for the first decision. This case is not between the same parties. A conviction cannot be put in evidence of guilt as between other parties: *Leyman v. Latimer* (2); *Castrique v. Imrie* (3); *Yates v. Kyffin-Taylor* (4), a case in the Palatine Court, where Hall V.-C. summed up the authorities.

[COZENŒ-HARDY M.R. referred to *Hutton v. Ras Steam Shipping Co.* (5)]

There the action was for wages which the naval Court had forfeited, that is, it was in fact an attempt to reverse the decision of that Court. The cases on election petitions, *Waygood v. James* (6) and *Stevens v. Tillet* (7) are in our favour, because they draw a distinction between the judge's certificate, which is conclusive evidence, and the findings in his report, which are not, but those cases are under the Parliamentary Elections Acts and not of much assistance. In the same manner the decisions of visitors of colleges are conclusive only as to the fact of deprivation, not as to the reasons alleged: *Philips v. Bury* (8); *Rex v. Grundon*. (9) See notes to the *Duchess of Kingston's Case* (10). In *Harvey v. Rex* (11), which the appellants rely on, the order in lunacy was only admitted as evidence of the fact that a Court of competent jurisdiction had appointed a receiver.

Buckmaster, K.C., in reply, referred to *Faulder v. Silk* (12) and *Sergeson v. Sealey*. (13)

Judgment was reserved until the appeals in *Clifford v. Timms* and *Clifford v. Phillips* should have been heard.

(1) (1855) 4 E. & B. 780, 794.

(2) (1878) 3 Ex. D. 352.

(3) (1870) L. R. 4 H. L. 414, 434.

(4) [1899] W. N. 141.

(5) [1907] 1 K. B. 834.

(6) (1869) L. R. 4 C. P. 361.

(7) (1870) L. R. 6 C. P. 147.

(8) (1694) 1 Ld. Raym. 5.

(9) (1775) 1 Cowp. 315.

(10) (1776) 2 Sm. L. C. 11th ed. pp. 731, 784.

(11) [1901] A. C. 601.

(12) (1811) 3 Camp. 126.

(13) (1742) 2 Atk. 412.

May 28. These appeals came on to be heard.

Buckmaster, K.C., and *E. F. Buckley*, for the appellant *Timms*.
Uppohn, K.C., and *E. Ford*, for the appellant *Phillips*.

H. Terrell, K.C., *A. Houston*, and *R. J. Drake*, for the respondents (the Cliffords) in each case; but the arguments were confined to the distinctions in fact and the wording of the deeds in each case. The point as to the effect of the Medical council's certificate and report was not re-argued.

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*Cur. adv. vult.*

June 12. COZENS-HARDY M.R. Although it will be necessary to deal separately with each of these three cases, there is one important point common to them all, which I think it desirable in the first instance to consider. Messrs. Isidore and Ruby Clifford, being registered dentists, entered into three separate partnerships with Hill, Phillips, and Timms for carrying on the profession or business of dentists, and the actions relate to the right of these three persons to determine the several partnerships on the ground that the Cliffords have, under the provisions of the Dentists Act, 1878, been found guilty of conduct which was "infamous or disgraceful in a professional respect," and have thereupon been removed from the Register of Dentists. The question arises whether the order of the General Medical Council, acting under the powers conferred by the Medical Act, 1858, and the Dentists Act, 1878, is to any and what extent evidence of professional misconduct on the part of the Cliffords. Now the Medical Council is the body to which, and to which alone, is confided the power, and with the power the duty, of altering the status of a dentist by removing his name from the register. The language of s. 13 of the Act of 1878 is clear. By s. 15 the facts are to be ascertained by a committee of the council, and the report of the committee is made conclusive as to the facts for the purpose of the exercise of the power by the council of erasing a name from the register. The consequences of removal of a name are set forth in ss. 3 and 5 of the Act. The person whose name is so removed cannot use the name or title of "dentist" or "dental practitioner," nor can



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he recover any fee or charge for the performance of any dental operation or for dental attendance or advice. It is contended on behalf of the Cliffords that the order of the Medical Council is *res inter alios acta* and not admissible in evidence to prove that they were guilty of professional misconduct. Warrington J. has adopted this contention; but with all respect to the learned judge, I cannot agree with this view. I think the order is admissible as evidence of the existence of conduct which was "infamous or disgraceful in a professional respect"—the proof of which fact was essential to the validity of the order of the General Council: see *Harvey v. Rex*. (1) It is by no means easy to find a satisfactory definition of a judgment in rem. In Smith's Leading Cases it is defined as "an adjudication pronounced, as its name indeed denotes, upon the status of some particular subject-matter by a tribunal having competent authority for that purpose." There are, however, two classes of judgments in rem, one of which is conclusive against all the world, and the other of which is not conclusive, though admissible, in any other proceedings. Instances of the former class are adjudications by a competent Court as to the existence of a marriage, or a condemnation of a prize in the Admiralty Court. A familiar instance of the second is an inquisition in lunacy, which has always been allowed to be read in a subsequent suit between third parties as evidence of the lunacy, though it is not conclusive and may be traversed: see *Sergeson v. Sealey* (2) and *Faulder v. Silk*. (3) A recent, and I think instructive, instance of the application of this doctrine is to be found in *Van Grutten v. Foxwell*. (4) The case is not reported on this point, although the point is mentioned. (5) A disentailing deed was executed by Mary Hartley in 1835. By an inquisition taken in 1845 she was found to have been insane from 1833. At the trial of the action before Vaughan Williams J. (6) it was argued that it was a finding in rem, a finding affecting the status of Mary Hartley, and that it was conclusive as against all the world to establish the

(1) [1901] A. C. 601, 611.

(2) 2 Atk. 412.

(3) 3 Camp. 126.

(4) [1897] A. C. 658.

(5) [1897] A. C. 660.

(6) The Master of the Rolls read from the appendix to the case in the House of Lords.

invalidity of the deed. But the learned judge said: "That clearly was to go much too far. It is not conclusive as against strangers. At the same time it is *prima facie* evidence against strangers." And he held the deed of no effect. The case went to the Court of Appeal. Lopes L.J. said: "The inquisition affords no doubt *prima facie*, but not conclusive, evidence of Mary's insanity in October, 1833, anterior to the execution of the disentailing deed, evidence which should be acted upon unless there is evidence the other way." And Rigby L.J. said: "The inquisition of 1843 is evidence that Mary was insane as from October, 1833, though, so far from being conclusive, it is not even strong evidence of her being insane at the date of the disentailing deed if a contrary case can be made out." And they held that there was sufficient evidence to the contrary and that the disentailing deed was valid. In my opinion the order of the General Council should be treated on the same footing as an inquisition. Unless and until evidence to the contrary is given, the order suffices to prove that the Cliffords were guilty of statutory misconduct. No evidence was given by the Cliffords to rebut this *prima facie* evidence. I may add that I doubt whether it is competent to any Court to review a declaration by the General Council that an act of a particular kind is "disgraceful conduct in a professional respect," even though it may be competent to review the decision that a certain individual has committed an act of that particular kind. I prefer to base my judgment on this general principle, although in the present case it might be sufficient to say that the respondents, by the mouth of their counsel speaking in their presence in the most formal manner, admitted "that they have been guilty, as has been found by the committee, of offences of professional misconduct," and promised not to repeat these offences. It remains to consider the several cases. Hill's partnership was created by a deed dated October 18, 1905, and it contained in clause 20 a provision that if any partner should at any time during the continuance of the partnership be "guilty of professional misconduct or of any act which is calculated to bring discredit upon or injure the business," or should "become incapable by reason of lunacy or otherwise to take his part in the management as the case may

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be of the business," then either of the other of them might by notice in writing determine the partnership as from the date of such notice. Under the earlier clauses of the deed, although Hill was the only partner who was bound to devote his time to carrying on the profession or business of dentists, the other partner had a right to take part in it. Ruby Clifford was in the first instance the only partner with Hill, but there were provisions under which Isidore Clifford could in certain events take his place. Hill shortly after the decision of the council on May 24, 1906, gave notice in writing to determine the partnership, and brought an action for a declaration that the notice was valid and that the partnership was determined, and for consequential relief. In my opinion the notice was valid. I think the Cliffords were guilty of "professional misconduct" within the meaning of clause 20, and that it is idle for a man who, in the language of s. 13 of the Act of 1878, has been guilty of "disgraceful conduct in a professional respect" to contend that he has not been guilty of "professional misconduct." I think, further, that, by reason of the removal of their names from the register the Cliffords have become incapable of taking part in the management of the business.

The partnership with Phillips was created by a deed dated June 19, 1895. The business was by clause 2 to be carried on under the style or firm of "Isidore Clifford." By clause 29 it was provided that if any of the partners be "guilty of professional misconduct or of any act which is calculated to bring discredit upon or injure the other of the partners or either of them, or the partnership business, the other partners shall be at liberty to give notice in writing of their intention to determine the partnership hereby created, and thereupon the partnership shall be dissolved and wound up." The language of this clause is very loose, but taken together with clause 27, which in terms assumes, or rather asserts, a right in Phillips to dissolve the partnership by notice by reason of injury done to the business through the public or private misconduct of Isidore Clifford, I think it is clear that it was competent to Phillips to give the notice of dissolution which he did give on June 20, 1906, dissolving the partnership. In my view all the considerations as to

professional misconduct which arose in Hill's case apply to this case. But there is a further peculiarity which ought not to be passed over. Phillips is not a registered dentist, and I infer from a statement made by his counsel in the Court below that he is not qualified to be put on the register. Under these circumstances it seems to me impossible to allow the two Cliffords, who are not on the register or qualified to be put on the register, to maintain an action against Phillips, who is also not on the register, for the purpose of securing the continuation of the professional business of dentists upon the terms of the partnership articles. The whole foundation or substratum of the partnership is gone. I doubt whether it is practicable to carry on the partnership business of dentists without incurring a penalty under the Dentists Act, and, if so, the partnership under present circumstances could not escape the taint of illegality.

The partnership with Timms was created by a deed dated October 2, 1899. Clause 23 is substantially the same as the corresponding clause in Hill's case, and I do not think it necessary to say anything more with reference to it. Timms gave a notice of dissolution which, for the reasons above stated, I think was valid. The result is that in my opinion the judgment appealed against must in each case be reversed. Judgment in Hill's action must be given for the relief asked by the claim, and the two actions brought by the Cliffords against Phillips and Timms must be dismissed. The Cliffords must pay the costs in the Court below and in this Court of each action.

SIR GORELL BARNES, PRESIDENT. These are appeals in three cases decided by Warrington J., the principal points in which are substantially the same, though there are certain minor points of difference with which I will deal later on in this judgment. In each case the question for determination is whether articles of partnership have been validly determined, and in each case one of the questions is as to the admissibility in evidence on behalf of the party seeking to determine the articles of partnership of certain proceedings before the General Council of Medical Education and Registration of the United Kingdom. The appeal in the case of *Hill v. Clifford* came on before this

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Court first, though the other two cases were heard before that case by Warrington J., but as the case of *Hill v. Clifford* was argued here at considerable length, and all the authorities which counsel desired to refer to were then cited, I think it will be convenient to deal with that case first, and afterwards refer to the minor differences which exist between that case and the other two. [His Lordship stated the facts of this case as above, and proceeded :—]

If the proceedings before the Dental Committee of the General Council and before the General Council were admissible in evidence, the plaintiff contended that the decision of the council that the defendants had been proved to have been guilty of conduct which was infamous or disgraceful in a professional respect established that the defendants had been guilty of professional misconduct or of acts which were calculated to bring discredit upon or injure the business aforesaid within the meaning of clause 20 of the articles of partnership, and the ground of this contention was that the decision of the General Council was equivalent to a judgment in rem upon the status of the parties affected by it, and was conclusive proof of the facts adjudicated upon. The objections to the admissibility of these proceedings were (1.) that they were *res inter alios acta*, and (2.) that the decision of the Medical Council, even if admissible, did not determine the issue raised in this case, as the terms in which the decision was given, which is in accordance with the language used in s. 13 of the Act of 1878, was not a finding of professional misconduct against the defendants within the meaning of the terms of the deed of partnership.

Warrington J. supported both these objections, for he stated in his judgment that the issue he had to try was not the issue which the General Medical Council had to try when they were dealing with the case under the Act, but was whether these gentlemen had been guilty of professional misconduct, not conduct which is described by the words above mentioned in the Act; and further, that in his opinion neither the report of the committee, the minutes of the committee, the evidence given before the committee, nor the order of the General Council, could be evidence in the present case in support of the

allegation that the defendants had been guilty of professional misconduct.

With regard to the second objection made by the defendants, it appears to me that if the decision of the General Council was admissible, the finding that the defendants had been guilty of conduct which was infamous or disgraceful in a professional respect was substantially a finding that they had been guilty of professional misconduct. I find myself unable to discern any distinction of substance between the two forms of expression: they appear to me to mean substantially the same thing, and any attempt to differentiate between them is an attempt to establish a distinction without a difference.

The first objection raised the very difficult question which was most fully and ably argued before us, viz., whether or not the proceedings aforesaid were admissible for the purpose of proving the fact of professional misconduct on the part of the defendants, but after considerable reflection I do not think it is necessary to determine that question in this case. For in my opinion the case may be disposed of upon the facts admitted or proved at the trial without using the report or order aforesaid for the purpose of proving the fact just referred to. As, however, the question was so much pressed for decision, I think it desirable to make some observations upon it which shew that I am not satisfied that the arguments of the appellant completely disposed of the difficulties of the matter.

The statute of 1878 constituted the General Council the proper tribunal to investigate the professional conduct of persons registered under the Act, and imposed a statutory duty upon that council, upon the application of any of the medical authorities, to cause an inquiry to be made into the case of a person alleged to be liable to have his name erased under s. 13 of the Act, and on proof of a conviction as mentioned in the said section, or that a registered person had been guilty of any infamous or disgraceful conduct in a professional respect, to cause the name of such person to be erased from the register, and s. 15, as already noticed, provided the means of ascertaining the facts to be placed before the General Council, and enacted that the report of the committee ascertaining the facts should be conclusive as to the

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facts for the purpose of the exercise of those powers by the General Council. The Legislature has thought fit to entrust these powers to this special tribunal, and it seems a most appropriate tribunal for the investigation of such a matter as that contemplated by the section to which I have referred, a tribunal more likely to be familiar with the matters which might be considered as amounting to professional misconduct, and more able to properly consider and deal with such matters than the ordinary tribunals of the country, consisting of a judge or of a judge and jury. Such a decision as that given by the council erasing the name of a registered practitioner from the register has a two-fold effect. It has the effect of preventing the person whose name has been erased from taking or using the name or title of "dentist" or of "dental practitioner," or of any description implying that he is registered, or is a person specially qualified to practise dentistry, and of preventing him from recovering any fee or charge in any Court for the performance of any dental operation or for any dental attendance or advice, and thus alters his professional status.

Before considering whether the order of the council was admissible in evidence, I may say that it would not appear to be necessary for the determination of this case to decide whether or not the report of the committee was also admissible, because the order or decision itself states enough for the purpose of the case. But if the order was admissible possibly the report was, as forming part of the order or decision in which the report is expressly referred to as finding the facts upon which the council acted.

The question with regard to the order of the council, so far as using it to prove the fact of professional misconduct by the defendants is concerned, is one of very considerable difficulty, and depends upon whether it can be considered as in the nature of a judgment in rem, and even if it can, the question arises for what purpose it may be used. A judgment in rem has been defined to be an adjudication pronounced upon the status of some particular subject-matter by a tribunal having competent authority for that purpose; and there is authority for the proposition that in certain judgments in rem the judgment or order is conclusive

against all the world, not merely for the immediate purpose thereof, but as to the existence of the ground on which the Court proposes to decide: see the cases collected under the *Duchess of Kingston's Case*. (1) As an instance of this may be given a sentence of condemnation as prize in a Court of Admiralty. The authorities, however, seem to me only to deal with the use or effect of the judgment on questions upon which the judgment is conclusive for its proper purpose or object, and not with regard to other issues, though in some exceptional cases such a judgment would seem to have been admitted within limits for a somewhat wider purpose. Then would this order fall within that class of judgment, or as in some cases, for instance in the case of inquisitions, would it be admissible in evidence, and if admissible would it be admissible to prove anything more than the fact that the names had been erased? I doubt very much whether the order could be held to be conclusive evidence in this case of the grounds upon which the council acted. I may give an instance, arising in cases with which I was at one time familiar, of an order which, in its effect, the order in question somewhat resembles, viz., the order of a Court holding a formal investigation into a shipping casualty under the Merchant Shipping Acts. If in such a case the Court should find that the loss or abandonment of or serious damage to a ship or loss of life has been caused by the wrongful act or default of a master mate or engineer, it may cancel or suspend his certificate: Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 470. Numerous cases have been dealt with under this Act and the Acts which it replaces, and in many cases actions have been brought by cargo owners and others against the shipowners in respect of the loss, but it has never so far as I am aware been suggested that the decision of the Court cancelling or suspending an officer's certificate could be used either as conclusive or any evidence against the owners to prove the loss and that it was caused by the officer's act or default, although his status as an officer is altered by the order, and although the order would no doubt be admissible upon a question as to what was the status of the officer and would probably be conclusive upon the point.

(1) 2 Sm. L. C. 11th ed. p. 731.

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Nor have I ever heard it suggested that such a decision could be used against a captain whose certificate had been cancelled or suspended if he had been in a position to be sued for the loss.

It would not be necessary, however, to decide whether the order was conclusive evidence even as against the defendants and of what and to what extent it was conclusive. It would probably be sufficient to determine whether the order was admissible in evidence in the case, because no evidence was given in answer to the plaintiff's case. Upon this point the cases upon inquisitions have a bearing, where it has been held that they are admissible in evidence, but may be traversed: see *Sergeson v. Sealey* (1); *In re Parry*. (2)

If the order should be admissible, the question then would seem to be for what purpose and to what extent would it be admissible in this case. Now I think upon this it must be borne in mind that the case is one relating to professional men who are subject to the special and peculiar jurisdiction of the Medical Council, and have entered into partnership with each other to carry on a profession in which they are subject to this jurisdiction, and liable to have their power to continue to carry on that profession determined by the action of the council if they act in a manner which renders them liable to have their names erased from the register. That the order was admissible in evidence for some purposes for which it may be required in this case is, in my opinion, clear. It was admissible as evidence, and conclusive evidence, of the fact that the defendants' names had been erased by the order of the council. I think, further, it might be admissible against the defendants to shew the grounds upon which it was made, as without one or other of the grounds specified in the Act the council had no jurisdiction to make the order, and I should doubt whether it would be a good order by such a tribunal unless it shewed the grounds of making it.

So far, however, the proof of the order and its admissibility on these points would not seem to be material upon the issue of misconduct in fact which the plaintiff required to establish.

Then a much more difficult question arises as to whether the

(1) 2 Atk. 412.

(2) (1866) L. R. 2 Eq. 95.

order would be admissible as evidence of the truth of the grounds upon which the decision of the council was given. If the judgment of Lord Lindley in *Harvey v. Rex* (1) is applicable to such a case as the present it would be an authority for holding that the order was *prima facie* evidence of the truth of the facts; but that was a peculiar case, in which it may be said that the proceedings in which the orders were tendered were of an interlocutory character, as they merely related to the question whether the defendant was prevented from shewing cause against a notice for making a certain decree absolute. I have been unable to satisfy myself that the order in the present case could be tendered as evidence against the defendants of the truth of the facts, especially when it is considered that the report of the committee as to the facts appears to be made upon evidence which is not taken on oath. But when the nature of the powers conferred upon the council and the position of the parties in their profession is considered, it seems to me that the order might possibly be evidence of this, that from the facts before them the council had found that the defendants had been guilty of conduct which was infamous or disgraceful in a professional respect; and, although the ordinary Courts may be competent to consider whether the facts were true, it seems to me that, having regard to the terms of the Act, it is extremely doubtful whether it would be competent for those Courts to hold that the special tribunal created by the Act had formed an erroneous opinion that the acts imputed to the defendants, and proved before them by the report of the committee, amounted to such conduct as aforesaid. If that could be done, then the remarkable position would be reached that the tribunal which is constituted to deal with cases of professional misconduct, and to erase names for such conduct, and from whose decision there is no appeal, might be considered to have arrived at an erroneous conclusion by another tribunal which had not the same capacity of judging of what was professional misconduct as the former, and would require to be assisted by evidence of witnesses unless the finding of the council is to be treated as the best evidence of what amounts to professional misconduct.

(1) [1901] A. C. 610.

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Here substantially the same facts which were before the council have been proved or admitted, and yet upon the issue of professional misconduct on the part of the defendants the Court is asked to say that these facts do not shew professional misconduct, although the Medical Council have held that they do.

The foregoing observations I think are also to some extent applicable to the point raised as to the right of the plaintiff to determine the partnership if the defendants should be guilty of any act calculated to bring discredit upon or injure the business.

There is, however, as I have already noticed, another purpose for which the order appears to me to be clearly admissible, and that is to prove that the defendants' names have been erased from the register by the order of the council, the result of which is that the defendants can no longer carry on the profession or business of dentists within the meaning of the deed, and in my opinion have become incapable of taking any part in the management thereof, and this result would justify the plaintiff in giving the notice to determine the partnership in pursuance of that part of clause 20 which is applicable in this event; and this is important to the plaintiff, because if he continued the partnership he might find himself in peril under the provisions of the Act for continuing in association with unregistered practitioners. [His Lordship read the admissions made by counsel who appeared for the respondents before the Medical Council and proceeded:—]

The course taken by the defendants was tantamount to a plea of guilty, and I think that they must be taken to have admitted the charges against them. It has been held that a record of judgment in a criminal case upon a plea of guilty is admissible in a civil action against the party as a solemn judicial confession of the fact: see Phillips on Evidence, 10th ed. vol. ii. p. 29, where he cites a case before Wood B. deciding the point.

I have read the pamphlets which were put in before Warrington J. Apart from the question of the admissibility of the order of the General Council, it seems to me that upon the evidence before Warrington J., consisting of the admissions made at the trial, the answers to interrogatories, and the admissions

made on behalf of the defendants before the committee and council, if it is necessary for the Court to arrive at a conclusion of fact, I cannot agree with the learned judge. I consider that the plaintiff has succeeded in proving his case and justifying his notice on the ground alleged in it.

There is a further point in this and the other two cases which is worth referring to, though it is not necessary to give any positive opinion upon it. By s. 34 of the Partnership Act, 1890, a partnership is in every case dissolved by the happening of any event which makes it unlawful for the business of the firm to be carried on or for the members of the firm to carry it on in partnership. As the Cliffords have ceased to be registered or entitled to be registered under the Act, and can no longer call themselves dentists and are liable to penalties if they do, it may perhaps be said that an event has happened which makes it unlawful for the business of the firm to be carried on by them, and that this may be so even though the defendants' names do not appear in the style of the firm; for the profession or business is to be carried on under the style of Dr. H. F. Hill, and is to be that of dentists, and if they remained partners in that firm they would be using the title of dentists within the meaning of the Act. It is idle to say that the partners can still do work of the kind performed by dentists without calling themselves dentists. The deed is a deed for a partnership as dentists, which cannot really be carried on any longer.

I am of opinion that the appeal in this case should be allowed, and that the plaintiff should have judgment for the necessary relief.

[His Lordship then stated the facts in the cases of *Clifford v. Timms* and *Clifford v. Phillips*, and his reasons for coming to the conclusion that no distinction could be made between the three cases.]

BUCKLEY L.J. I also am of opinion that this appeal must be allowed. I should add nothing but that, inasmuch as we are differing from the learned judge, I ought to give my reasons in my own words.

There is a short ground arising upon the construction of the

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agreement sufficient in itself, I think, to determine this appeal. The deed of October 18, 1905, provides (clause 1) that the profession or business of dentists shall be carried on by Ruby Clifford and Hill, and (clause 2) the style is to be "Dr. H. F. Hill." By clause 8 Ruby Clifford is at liberty to take such part as he thinks fit in the conduct of the business and to see and attend to any patient or patients of the business. Clause 20 then provides that if Ruby Clifford shall during the continuance of these presents "become incapable by reason of lunacy or otherwise to take his part in the management as the case may be of the business," Hill may by notice in writing determine these presents. The words "as the case may be" here mean, I think, take "such part in the management as under the provisions of these presents are appropriate to his case."

The proceedings before the General Medical Council have resulted in an order the effect of which is that under s. 3 of the Act of 1878 Ruby Clifford is not entitled to take or use the name or title of dentist, and that under s. 5 he cannot recover any fee or charge for the performance of any dental operation. He has thus become incapable of being and acting as a partner in the profession or business of dentists which is the subject of the partnership carried on under the style of Dr. H. F. Hill. The words that I have quoted from clause 20 in my opinion apply to his case. The notice which the plaintiff gave was, I think, authorized by the words "become incapable to take his part in the management as the case may be of the business." Apart, moreover, from those particular words of clause 20, the facts are that the proper authority controlling his profession have made an order the result of which is that he can no longer under the partnership style carry on the partnership business or see or attend to patients. If, therefore, the partnership deed remains in operation, Hill is placed in this position, that under clause 8 he is bound to allow Ruby Clifford to see patients on the partnership premises under the partnership style, with the result that Hill will be guilty of professional misconduct by acting in partnership with a person who is by the Act of Parliament precluded from taking or using the name or title of dentist. For after the order of the Medical Council Ruby Clifford is

neither registered nor qualified to be registered under the Dentists Act.

Further, in addition to and apart from these grounds, I am unable to agree in the view which the learned judge took in the following matters. The Act of 1878 speaks in s. 13 of "infamous or disgraceful conduct in a professional respect." The General Medical Council, to whom is committed by the Act of Parliament the exclusive right and duty of adjudicating upon that subject-matter, have found the defendant guilty of such conduct. The partnership speaks of "professional misconduct." Conduct infamous or disgraceful in a professional respect must, as it seems to me, be professional misconduct. I fail to understand how a person can be innocent of misconducting himself professionally when he has been guilty of infamous or disgraceful conduct in a professional respect. Further, I am unable to agree with the learned judge in thinking that materials which the plaintiff tendered in evidence were inadmissible. The order of the General Medical Council is unquestionably admissible, and is, indeed, conclusive upon the question that Ruby Clifford's name has been erased from the register. It is in my opinion also admissible to shew the grounds upon which his name was erased. This is not the same as saying that it is evidence that those grounds were truly alleged. The Act provides, s. 15, that the report of the council shall be conclusive as to the facts for the purpose of the exercise of the power by the General Medical Council. The order may, I think, be tendered in evidence for at least two purposes—first, to shew its own existence; and, secondly, to shew the grounds on which it was made. The next stage is no doubt more difficult, namely, whether it is admissible as evidence of the truth of those facts. It is no doubt not conclusive as to their truth. But it is, I think, admissible as evidence of their truth. The order of the General Medical Council is a proceeding in rem in that it affects the status of Ruby Clifford in a matter which, for the purposes of this agreement, is vital, namely, whether he has the status of a registered dentist. Lord Lindley's words in *Harvey v. Rex* (1) are, I think, appropriate to this state of facts.

(1) [1901] A. C. 601, 611.

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The passage in Taylor on Evidence, 10th ed., ss. 1674 et seq., and the cases there quoted, go to shew that certain judgments in rem which are not conclusive evidence are yet admissible in evidence within proper limits. The present case, however, does not stop at this point. The counsel who appeared for Ruby Clifford before the General Medical Council made certain admissions. The learned judge has excluded them. They were made by counsel in the presence of the party, and of course with a full sense of responsibility, and have in my opinion the same weight as if made by the party himself. An admission is of course not conclusive, but is admissible in evidence against the party who made it. Counsel, after admitting certain facts, went on to admit that Ruby Clifford was guilty, as the General Medical Council had found him to be, and he elected to call no witnesses. In this present proceeding it would, I think, notwithstanding the order of the General Medical Council, have been competent to Ruby Clifford to have asserted and have proved if he could that he had not been guilty of professional misconduct, but he has adduced no evidence at all for that purpose. The appellant has, by the use of materials which I think were open to him, established the fact that Clifford was so guilty. For these reasons I think that this appeal must succeed, and the order below be discharged, substituting a declaration that the plaintiff's notice was a valid notice with proper consequential relief, including a declaration that Isidore is not entitled to be substituted for Ruby, and an order that the defendants pay the costs up to and including the trial and the costs of this appeal.

[His Lordship then examined the facts and the clauses in the deeds in *Clifford v. Timms* and *Clifford v. Phillips*, and expressed his conclusion that there was no practical difference between the cases, and the appeals in those cases must also be allowed.]

Solicitors: *Maddison, Stirling, Humm & Davies; H. Wilson; Samuel Lithgow; H. P. Becher.*

J. R. B

*In re* KINGSBURY COLLIERIES, LIMITED AND  
MOORE'S CONTRACT.

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J.

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May 1, 2.

[1907 K. 300.]

*Vendor and Purchaser—Commercial Company—Memorandum of Association—  
Power to Acquire Land—No Express Power of Sale—Constitution of  
Company—Implied Power.*

A commercial corporation has such powers as are expressly or impliedly warranted by its constitution.

The objects of a colliery company incorporated under the Companies Act, 1862, as expressed in its memorandum of association, included the purchasing or taking upon lease and working of certain coal mines and mineral lands, the selling of coal and other products, the carrying on generally of the businesses of colliers and coal merchants, and the acquiring of real estate or any right or interest therein. There was no express power of sale of real estate.

*Held*, that the company had power to sell land which it had acquired, a power to sell real estate being impliedly warranted by the constitution of the company.

*Johns v. Balfour*, (1889) 1 Megone, 191, applied.

VENDOR AND PURCHASER SUMMONS.

In the year 1906 the Kingsbury Collieries, Limited, a company incorporated in 1878 under the Companies Acts, 1862 to 1877, acquired certain freehold land with the object of building cottages thereon for its workmen, but found subsequently that it would be more suitable and convenient to sell the land to the present purchasers, Messrs. F. H. & J. W. Moore, upon an arrangement that Messrs. Moore should erect workmen's cottages on the land and lease them to the company. The company accordingly entered into a contract for sale of the land in question to the purchasers, who, upon investigating the title, raised the objection that the company had no power to sell the land, and took out this summons for a declaration to that effect.

The objects of the company as stated in the memorandum of association were, so far as material, as follows:—

“(a) The purchasing or taking upon lease, or by way of mining set or licence, and subject to a royalty or otherwise,



KEKEWICH certain coal mines and mineral lands and brickfields" therein mentioned.

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"(b) The purchasing or taking upon lease, or by way of mining set or licence, and subject to a royalty or otherwise, any other coal, clay, ironstone, and other minerals in the neighbourhood of the said collieries and brickfields, or in any other township or place in England or Wales.

"(c) The working the said coal mines and mineral lands, or any other coal mines or mineral lands which may be hereafter acquired by the company in England or Wales, and the selling the coal and other products that may be obtained therefrom. . . .

"(d) The acquiring real estate or any right or interest therein in England and Wales, and the acquiring patent rights or trademarks or any interest therein for the purposes of the company.

"(e) The purchasing, establishing, and constructing buildings, works, engines, machinery, railways, rolling stock, plant, and all other conveniences for the purposes of the company."

"(g) The selling, exporting, and transmitting to any place or places . . . the coal or minerals and other products obtained from the said coal mines and mineral lands, and generally the carrying on of the businesses of colliers and coal merchants."

"(k) The doing all such other things as are incidental or conducive to the attainment of the above objects."

*Marcy*, for the purchasers. The question of law in this case is whether limited companies have the powers of common law corporations. Companies incorporated under the Companies Act, 1862, are limited corporations, and cannot travel outside their memorandum of association. A company is not, by incorporation under the Act, created a corporation with inherent common law rights: *Ashbury Railway Carriage and Iron Co. v. Riche*. (1) In *Reg. v. Reed* (2) Cotton L.J. says that corporations established for certain specified purposes, except so far as they had express powers given to them, have such powers only as are necessary for the purpose of enabling them in a reasonable

(1) (1875) L. R. 7 H. L. 653.

(2) (1880) 5 Q. B. D. 483, 488.

and proper way to discharge the duties or fulfil the purposes for which they were constituted. KEKEWICH  
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A commercial company can, as a business necessity, mortgage its land; but that is not going so far as to say that, in the absence of a power express or implied, it can sell its real estate: *In re Patent File Co.* (1); *General Auction Estate and Monetary Co. v. Smith.* (2) There is a difference in principle between a sale and a mortgage, inasmuch as the mortgagor does not lose dominion over his land. The vendor company, therefore, not having the inherent powers of a common law corporation, must rely on its memorandum and articles of association, which, although not so verbose as the forms now in use, are nevertheless very precise in details. Clause (d) gives the company power to buy real estate, and clause (k) confers incidental or conducive powers. In *Johns v. Balfour* (3), Stirling J. held that a colliery company, which had no express power to buy real estate, but was empowered to do all things incidental and conducive to its objects, could buy land; but that case is not analogous, because a company must necessarily have power to buy real estate if it is to work a colliery. In *Studdert v. Grosvenor* (4) Kay J., with reference to the words "incidental or conducive" and the decisions relating to them, said: "In the absence of this authority I should have been inclined to suppose that such words could hardly be treated as enlarging the scope of the company's operations, but must rather be considered as expressio eorum quæ tacite insunt," and on this point the judgments of the Court of Appeal in *Attorney-General v. Mersey Ry. Co.* (5) are in my favour. I submit that the purchasers' objection is well founded, and that the vendor company cannot make a good title.

*J. Fischer Williams*, for the vendor company. First, as a matter of construction of the terms of the memorandum of association, this company has power to sell the real estate, partly as a matter of inference from the powers actually given and partly from the terms of clause (k) enabling it to do all things incidental or conducive to the performance of the objects of the

(1) (1870) L. R. 6 Ch. 83, 86.

(3) 1 Megone, 191.

(2) [1891] 3 Ch. 432.

(4) (1886) 33 Ch. D. 528, 538.

(5) [1907] 1 Ch. 81.

KEKEWICH company. Secondly, if there is no power under the memorandum of association, there is an inherent power to dispose of its property, including real estate.

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On the first point the only express power of sale is to sell coal and bricks, but there is special power to acquire real estate. It must be incidental and conducive to the objects of the company for it to be able to dispose of what it has acquired. The general principle of construction of a memorandum and articles of association is stated in *Attorney-General v. Mersey Ry. Co.* (1), where Vaughan Williams L.J. said that a wider construction ought to be given to the words of a memorandum of association creating and defining the powers of a purely commercial company, having no compulsory powers and no monopoly, than would be given to the words of a statute creating a company like a railway company having compulsory powers of land purchase and a practical monopoly. In the case of *In re Patent File Co.* (2) James L.J. said that a body corporate could hold and dispose of property as freely as an individual unless specially prohibited. Then in *General Auction Estate and Monetary Co. v. Smith* (3) it was held that the company had an implied power to borrow money for the purposes of its business, though there was no express power under the memorandum and articles. In *Johns v. Balfour* (4) there was no express power to purchase land, and it was held that the purchase of land might be "incidental and conducive" to the attainment of the company's objects, and the Court allowed the purchase to be made. The real key to the question in this and in other cases is whether the company is undertaking a new business, and making a new departure: *Attorney-General v. London County Council.* (5) It is not necessary to put into the memorandum all the particular incidental acts by which it is proposed to carry on the business of the company. I submit that this commercial company has, as incidental to the carrying on of its business, the right to dispose of its property.

Secondly, there is an inherent power to alien land incidental

(1) [1907] 1 Ch. 81.

(4) 1 Megone, 191.

(2) L. R. 6 Ch. 83, 86.

(5) [1901] 1 Ch. 781; [1902] A. C.

(3) [1891] 3 Ch. 432.

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to a company such as this, quite apart from the terms of the memorandum. In *Sutton's Hospital Case* (1) it is stated "that when a corporation is duly created, all other incidents are tacite annexed, . . . ." and in stating what things are incident to the clauses of a charter of a corporation "by the same to have authority, ability, and capacity to purchase, but no clause is added that they may alien, &c., and, it need not, for it is incident." There is a somewhat similar dictum in *The Bankers' Case*. (2) The general right of a corporation to alienate their lands is discussed in *Colchester Corporation v. Lowten*. (3) These cases all support the proposition that a commercial corporation has prima facie, as incidental to its corporate capacity, a power to alien land unless there is something which prevents it.

[He also referred to *In re Consett Iron Co.* (4) and *Simpson v. Westminster Palace Hotel Co.* (5)]

KEKEWICH J. The vendors are a colliery company, and have purchased land which they wanted for the purpose of erecting thereon residences for their workmen, but then, finding that course inconvenient, they proposed to sell the land to the purchaser under an agreement that he should erect the cottages and lease them to the company. The purchaser has taken the objection that the company has no power to sell its land, and that the proposed sale is ultra vires.

Before dealing with the construction of the company's memorandum of association, it will be useful to see how the law stands. I have had many cases cited to me, including *The Bankers' Case* (2), but I find in Lord Lindley's book on Companies, 6th ed., vol. i., all that is necessary for laying down the law on the subject. First, on p. 255, under the heading "Sales," the author says: "Corporations not created for any clearly limited purpose have by common law full power to sell their own corporate property." That is one of the points made on behalf of the vendors, and is undoubtedly correct.

Then comes the question whether the general law is directly

(1) (1613) 10 Rep. 30b.

(3) (1813) 1 V. & B. 226.

(2) (1695) Skin. 601, 602.

(4) [1901] 1 Ch. 236.

(5) (1860) 8 H. L. C. 712.

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KEKEWICH applicable to a company, such as this, incorporated under the Companies Act, 1862. With regard to corporations generally, as well as those formed for particular purposes, the same learned author says on p. 216: "It is agreed on all hands that a corporation cannot lawfully do that which its constitution does not expressly or impliedly warrant. The difference of opinion, if there really be any, is not as to that, but simply as to whether the act of incorporation is to be regarded as conferring unlimited powers except where the contrary can be shewn; or whether alleged corporate powers are not rather to be denied unless they can be shewn to have been conferred either expressly or by necessary implication. The former is apparently the correct view so far as municipal and other corporations not created for any clearly limited purpose are concerned; but the latter is now settled to be the correct view with respect to trading and similar corporations which are created for certain definite purposes only. That such corporations cannot do that which their constitution does not warrant admits of no doubt, and is conclusively established by the decision of the House of Lords in *Ashbury Railway Carriage and Iron Co. v. Riche*." (1) That is the authority on which counsel for the purchaser strongly relied in his argument. A short summary of that decision is given by Lord Lindley on the page from which I have just quoted, but it is worth while to examine more closely what that case really decides. What the purchaser insists upon is that unless the power can be found expressly mentioned in the memorandum of association, or can be extracted by necessary implication from some other words in the memorandum of association, the power does not exist. But that is not the view expressed by the learned author to whom I have referred. His phrase is "what their constitution does not warrant."

I will now turn to a few of the passages in the speeches in *Ashbury Railway Carriage and Iron Co. v. Riche* (1), and I think I can shew by them that Lord Lindley has expressed the law correctly, and that the argument on behalf of the purchaser goes much too far. Lord Cairns L.C. says (2): "With regard to the memorandum of association, your Lordships will find, as

(1) L. R. 7 H. L. 653.

(2) L. R. 7 H. L. 667, 669.

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has often already been pointed out, although it appears somewhat to have been overlooked in the present case, that that is, as it were, the charter, and defines the limitation of the powers of a company to be established under the Act." The Lord Chancellor does not for a moment say that the powers must be all specified in the memorandum of association, nor does he say a word contrary to Lord Lindley's statement which I have quoted above. Then further on the Lord Chancellor says: "Your Lordships will observe, therefore, that it is to be a covenant in which every member of the company is to covenant that he will observe the conditions of the memorandum, one of which is that the objects for which the company is established are the objects mentioned in the memorandum, and that he not only will observe that, but will observe it subject to the provisions of this Act." Lord Cairns there uses the phrase "the objects mentioned in the memorandum," but I am satisfied that he never meant the word "mentioned" to be taken as meaning "specified or set out at length" in the memorandum, in the sense that they must be found in the express language of the memorandum. Lord Chelmsford also in reference to Blackburn J.'s observations on the provisions of s. 12 "that, save as aforesaid, no alteration shall be made in the conditions contained in the memorandum of association," says (1): "I do not know how stronger words than these could be used to prohibit a company formed under the statute from entering into any contract for any object beyond those mentioned in the memorandum of association." Again, I am satisfied that Lord Chelmsford ought not to be taken to have used the word "mentioned" in the sense of "stated in express words." Lord Hatherley uses a rather stronger word when he speaks of "any other object whatsoever than those specified in the memorandum of association." (2) "Specified" is, no doubt, a little more precise word than "mentioned," but having regard to these statements, I cannot believe that Lord Hatherley meant to limit "specified" to those objects set out in express terms in the memorandum of association. Lord Selborne says (3): "I think

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(1) L. R. 7 H. L. 678.

(2) L. R. 7 H. L. 687.

(3) L. R. 7 H. L. 694.

KEKEWICH J. that contracts for objects and purposes foreign to, or inconsistent with, the memorandum of association are ultra vires of the corporation itself. And it seems to me far more accurate to say that the inability of such companies to make such contracts rests on an original limitation and circumscription of their powers by the law, and for the purposes of their incorporation, than that it depends upon some express or implied prohibition, making acts unlawful which otherwise they would have had a legal capacity to do." That seems to me to point directly to there being contained in the memorandum of association anything which is fairly incident to the objects therein expressed, so that it can be said to be there by reasonable implication.

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Then in *Reg. v. Reed* (1) there is, in connection with this question, a passage to which it will be well to refer. It is not necessary to go into that case, because it is a school board case, but Cotton L.J. says: "In our opinion the power of a corporation established for certain specified purposes must depend on what those purposes are, and except so far as it has express powers given to it, it will have such powers only as are necessary for the purpose of enabling it in a reasonable and proper way to discharge the duties or fulfil the purposes for which it was constituted." It is not possible to suppose that the Court of Appeal in that case intended in the slightest degree to depart from the decision in *Ashbury Railway Carriage and Iron Co. v. Riche* (2), and the passage which I have just read does not appear to me to be inconsistent in any way with the law as it was laid down by the House of Lords in that case and as it has been understood ever since.

The case of *Attorney-General v. Mersey Ry. Co.* (3), although a valuable decision upon the law relating to the powers of railway companies, has not such a bearing on this point as to be cited at any length, but there is a passage in the report which is of importance. It is an addition made by Vaughan Williams L.J. to his own judgment, with, as I understand it, the assent of Buckley L.J. He says (4): "You ought to give a wider construction

(1) 5 Q. B. D. 483, 488.

(2) L. R. 7 H. L. 653.

(3) [1907] 1 Ch. 81.

(4) [1907] 1 Ch. 106.

to the words of a memorandum of association creating and defining the powers of a purely commercial company having no compulsory powers and no monopoly than you would give to the words of a statute creating a company, like a railway company, having compulsory powers of land purchase and a practical monopoly." That statement, read with the passage which I first read from Lord Lindley's book, seems to me to be extremely useful as indicating on what lines the memorandum of association of a commercial company is to be construed.

I now turn to the memorandum of association of the company in the present case, and I propose to construe it on those lines.

This is a colliery company, the objects of which are stated in the memorandum of association in alphabetical notation, and, unlike the more lengthy memoranda of association of the present day, the letter (*k*) exhausts the list. [His Lordship read the objects of the company, and continued:] There is no express power at all to sell land, although the company has power to acquire it. Clause (*k*) contains the common form of object, about which I will say what Kay J. said in *Studdert v. Grosvenor* (1) about a similar clause and the decisions on the subject: "In the absence of this authority I should have been inclined to suppose that such words could hardly be treated as enlarging the scope of the company's operations, but must rather be considered as *expressio eorum quæ tacite insunt*." I adopt that language, and do not pay the slightest attention to this clause as containing anything like an express power or an object different from any of those which have been mentioned before.

Now ought I to consider that the sale of real estate comes reasonably within the powers of this company as being warranted impliedly by the constitution of the company?

I called the attention of counsel to the difficulty which occurs in including in the memorandum of association everything which a company can be supposed to want at any point of time. When that is done, the necessary result is that if some power is omitted, the suggestion to most minds, is that if it is not there the power is not warranted. To say that every power must be expressly stated in the memorandum of association at once leads

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KEKEWICH to the argument *inclusio unius exclusio alterius*. I hope the  
 J. Courts will never come to hold that, but nevertheless it is the  
 1907 natural conclusion resulting from setting out everything that a  
 KINGSBURY company can possibly want. In this case I put that argument  
 COLLIERIES, on one side altogether. It is quite out of place here.  
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This memorandum is not so elaborate as those to which I have been referring. It confers power to acquire land, but does it impliedly give a power to sell it? On this point I have the authority of *Johns v. Balfour* (1), an authority which seems to carry me the whole way, and I will refer to it at some little length. In that case the question was not the sale, but the purchase, of land. The company had for its objects the purchase of iron mines in Russia, and the question raised was whether the company had power to purchase lands. The question was raised on a motion to restrain the directors from proceeding to purchase. It was a matter of some moment, because, apart from the question of law, there was a question of a large amount of money, namely, 200,000*l.*, and a proposal to let out the surface at a rent which would bring in 4000*l.* per annum, and it was important for the directors to know whether they were safe. The case was properly argued at length by eminent counsel, and this is what Stirling J. says: "It is admitted there is no express power in the memorandum for the company to purchase land. It is true a company cannot do anything outside its objects as contained in its memorandum, but this statement is to be taken in the qualified sense as stated by the Lord Chancellor in *Attorney-General v. Great Eastern Ry. Co.* (2): 'I agree with Lord Justice James that this doctrine ought to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the Legislature has authorized, ought not (unless expressly prohibited) to be held, by judicial construction, to be *ultra vires*.' Therefore, even if here there were not the words 'incidental and conducive,' I should be bound to construe the memorandum in a reasonable way. Now the objects specified are to work iron and coal mines. But to work them, they must be acquired somehow. Here there

(1) 1 Megone, 191, 194.

(2) (1880) 5 App. Cas 473, 478.

is already a limited acquisition under the lease. The question is, that being so, whether it is beyond the power of the company to acquire the fee simple. Let us see what is the nature of the property. The affidavits say that valuable seams of coal pass under the whole of the land. The property is clearly a mining property. In these circumstances is it beyond the company's powers to acquire the surface? If it may acquire the mines for a term of years, I do not see why not the surface. . . . If hereafter the company should embark on something beyond its objects, the Court would interfere, but on the materials now before me I do not think that what the company proposes is ultra vires, and therefore the motion is refused." Therefore the learned judge held that the company might properly purchase the land.

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No doubt a somewhat different question arises upon sale. In this case the company has power to purchase, and this is not a sale of the company's business or a sale of the colliery, but a sale for the purpose of making the property, which they now have, more convenient for certain purposes. No one has said that the company could not buy this land, but it is said that the company cannot sell it. The argument went upon the words of clause (k), but I do not rely on them at all. I regard them as a needless expression of what would be there without them. I treat this as a question whether a colliery company, carrying on business of this kind and having land, would be in a position to sell that land from time to time in a proper way. It appears to me that to say that the company cannot sell this land would be contrary to the principle of the decision in *Johns v. Balfour* (1) and to the rules laid down by Lord Lindley. The purchaser's objection, therefore, must be disallowed.

Solicitors: *Geare & Willis, for Martin & Sons, Nottingham; Biddle, Thorne, Welsford & Sidgwick.*

(1) 1 Megone, 191.

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May 9, 10,

*In re* HEATH.  
HEATH v. WIDGEON.

[1907 H. 310.]

*Husband and Wife—Intestacy of Husband—Widow—Contingent Reversionary Interest—Real and Personal Estate—Intestates' Estates Act, 1890 (53 & 54 Vict. c. 29), ss. 1, 5, 6.*

An intestate, who left a widow but no issue, was at the date of his death in 1894 entitled to a contingent reversionary interest in certain real and personal property. With the exception of assets to the value of 10*l.* this interest comprised his whole property. It was of no market value at the time, but in 1904 it fell into possession and proved to be worth about 3500*l.* The widow of the intestate now claimed to be absolutely entitled to the whole under s. 1 of the Intestates' Estates Act, 1890, on the ground that at the date of the death of the intestate the net value of such "real and personal estates" did not exceed 500*l.* :—

*Held*, that the value of the intestate's real and personal estates must be taken as at his death, and the whole passed absolutely to his widow for such estate and interest as the intestate had therein :

The fact that the Intestates' Estates Act, 1890, only contains provisions for ascertaining the net value of real and personal property in possession does not exclude interests in reversion from the operation of the general words of s. 1 of the Act.

THIS was a summons by the plaintiff Elizabeth Heath, the legal personal representative of Harriet Julia Heath and George Heath, to determine the question whether the defendant Kate Widgeon was entitled under the provisions of the Intestates' Estates Act, 1890, to the whole of the real estate and one fifth part of the personal estate of Harriet Julia Heath. The question arose out of the following state of facts.

By his will dated April 28, 1870, Richard Deacon gave all his real and personal estate to his daughter Louisa Deacon, her heirs and assigns, for ever, for her own sole and separate use and benefit, and in case his said daughter should happen to die leaving no issue, then he gave his said real and personal estate to his two nieces Harriet Julia Heath and Rosa Deacon, their heirs and assigns for ever, equally to be divided between them, share and share alike, for their own separate use and benefit.

Louisa Deacon was born on April 1, 1862; she first married KEKEWICH J. F. Mead in 1880. There was no issue, and the marriage was dissolved by the Divorce Court. In 1884 she married C. H. Roberts, and there was no issue of this marriage. On November 9, 1904, Louisa Roberts died.

Richard Deacon died in 1871.

His niece Harriet Julia Heath died intestate in March, 1883, leaving her husband George Heath, who took the whole of her interest in the personal estate. As to her real estate her husband could claim no right, as she was never seised in possession, and it descended to John Heath, her eldest surviving son.

George Heath died in April, 1887, intestate, leaving five next of kin, namely, the plaintiff Elizabeth Heath and her two sisters, the defendants Rose Julia Dowden and Jane Atkins, and his two sons John Heath and Robert Smith Heath. On March 5, 1887, John Heath married the defendant Kate Widgeon (then Kate Powell), and he died on September 4, 1894, intestate and without having had any issue. On his death his whole estate consisted of household furniture and personal effects of the value of 10*l.* and the contingent reversionary interest which his mother, H. J. Heath, took under the will of Richard Deacon. The widow of John Heath on January 12, 1898, married James William Widgeon. On the death of John Heath, subject to his widow's rights, his interest in the real estate descended to Robert Smith Heath, his brother and heir-at-law, and his interest in the personal estate passed to his next of kin, namely, the plaintiff Elizabeth Heath and her two sisters and the said Robert Smith Heath. R. S. Heath died in 1900, intestate and a bachelor, leaving the plaintiff and her two sisters his coheirresses-at-law and sole next of kin, but any interest of his in the real estate as well as the personal estate was vested in the plaintiff Elizabeth Heath as his legal personal representative under letters of administration.

By two orders made on November 13, 1906, it was (inter alia) held that, in the events which had happened, Harriet Julia Heath became indefeasibly entitled, after the death of Louisa Roberts, the tenant for life under the will of Richard Deacon, to one moiety of the residuary personal estate of the

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KEKEWICH said testator, and to one moiety of the real estate of the said J. testator.

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The defendant Kate Widgeon now claimed the whole of the property representing the moiety of real estate to which H. J. Heath was thus contingently entitled, and one-fifth of the moiety of the personal estate to which H. J. Heath was similarly entitled, on the ground that the whole of such interest belonged to her late husband John Heath at the date of his death, and was of less value than 500*l.* at that time. At the date of John Heath's death this contingent reversionary interest in the real estate and residuary personal estate of the testator Richard Deacon was not considered of any value, and was not, in fact, valued. An affidavit was made in 1907 by a skilled actuary stating that this interest on September 4, 1894, had no market value at all, being liable to entire defeat in the event of a lady then aged thirty-two dying and leaving issue. It had, however, some value, and he estimated it at 388*l.* as on September 4, 1894. The actual present value of the estate in question in the action was about 3500*l.*

*Percy Wheeler*, for the plaintiff. The contingency of a married woman of thirty-two dying without issue having happened, the question is, What does the widow of J. Heath now take by virtue of the Intestates Estates Act, 1890? Is she entitled to the whole, or only to 500*l.*? I submit that s. 1 of the Act (1) does not apply

(1) The Intestates' Estates Act, 1890, provided:—

Sect. 1: "The real and personal estates of every man who shall die intestate after the first day of September one thousand eight hundred and ninety leaving a widow but no issue shall, in all cases where the net value of such real and personal estates shall not exceed five hundred pounds, belong to his widow absolutely and exclusively."

Sect. 2: "Where the net value of the real and personal estates in the preceding section mentioned shall exceed the sum of five hundred

pounds the widow of such intestate shall be entitled to five hundred pounds part thereof absolutely and exclusively, and shall have a charge upon the whole of such real and personal estates for such five hundred pounds, with interest thereon from the date of the death of the intestate at four per cent. per annum until payment."

Sect. 5: "The net value of such real estates as aforesaid shall for the purposes of this Act be estimated in the case of a fee simple upon the basis of twenty years' purchase of the annual value by the year at the

to a reversionary interest of this nature, but only to property in possession. It was a special Act for a special purpose, the object being to make immediate provision for the widow of the intestate. The method of valuing realty prescribed by s. 5 clearly indicates that the Act only contemplates property in possession, for property tax comes under the Income Tax Act, which only deals with property in possession, so that it was not possible to include any property not taxable under that Act. Sect. 6 also bears out this view.

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*P. O. Lawrence, K.C.*, and *Percy Vaughan*, for two of the defendants, coheirresses and next of kin of the intestate. There are two views—(1.) that the Act does not apply, and therefore the widow takes one half of the estate; and (2.) that 500*l.* is charged on the property irrespective of the interest which the widow takes. Sect. 1 speaks of “real estates” and not of interests in it, and s. 5 relates to the valuation of such real estates. The true deduction from those sections is that the Legislature never contemplated any payment out to the widow other than payment out of a fund in existence, the object being to provide for her out of the estate a certain sum for immediate necessities. Sects. 5 and 6 were intended to exhaust the valuation of the real and personal estate. We submit that under the Act it is obvious that it was property in possession with which the Legislature intended to deal, and s. 5 bears that out, because a fee simple in remainder could not be valued under the provisions of that section. It is admitted that the widow is entitled to 500*l.* at least.

*Jessel, K.C.*, and *Sargant*, for Mrs. Widgeon. For the purposes

date of the death of the intestate as determined by law for the purposes of property tax, less the gross amount of any mortgage or other principal sum charged thereon, and less the value of any annuity or other periodical payment chargeable thereon, to be valued according to the tables and rules in the schedule annexed to the statute 16 & 17 Vict. c. 51, and in the case of an

estate for a life or lives according to the said tables and rules.”

Sect. 6: “The net value of such personal estate as aforesaid shall be ascertained by deducting from the gross value thereof all debts, funeral and testamentary expenses of the intestate, and all other lawful liabilities and charges to which the said personal estate shall be subject.”

KEKEWICH J. of this Act the value of the property is to be taken at the death of the intestate. The 1st section of the Act is clear, and applies to all interests in real and personal estate. It may be that s. 5 is confined to the mode of valuing fee simple estates and estates for life and that no mode is prescribed for valuing reversionary interests. Sect. 5 of the Act only goes one step in ascertaining the value of the estate: if it is an estate in possession, that step determines its value; if it is a reversion or a contingent interest, you have to take a second step in order to find out the full value of such an interest, and there are methods of computation of the value of such estates. That section does not exclude them from the operation of s. 1 or confine s. 1 to fee simple estates in possession. With regard to the value of this interest at the date of the death of the intestate, it is capable of being valued, and one valuer has in fact estimated it as worth 388*l.* at that time. If the testator had made his will in the terms of the Act, the meaning would be clear.

KEKEWICH J. It may be assumed that this point which falls for decision was not present to the framers of this Act. Still, the Act has to be applied to the circumstances which have occurred. As regards the 1st section standing alone—and its meaning is not in the least affected by ss. 2 or 3—there seems to me to be no room for doubt that the real and personal estates of an intestate must be taken as being what they are at the date of his death, and it is then, and at no other time, that you must ascertain whether the total value amounts to 500*l.* or not. If that is omitted to be done in the course of administration, it can be done afterwards. It is not satisfactory, we know, because there is always a difficulty in valuing property *nunc pro tunc*, but still it can be done. Competent persons can tell you what was the value of property a certain number of years ago, but you must take the value at that time, and, having ascertained that the value does not exceed 500*l.*, then the Act seems to me to say in plain terms that all he has, whether real or personal estate, shall belong to the widow. The real and personal estate of a man means all he has, whether in possession, reversion, or contingency. Of course it excludes expectations in the vulgar

sense of the word; that he has not: there is no such property known to the law as an expectation, though we sometimes speak of an estate in expectancy. Whatever he had, whatever you can put your finger on and say that belonged to him, shall belong to the widow. The real test is, Could he have devised it? This is only like the Statute of Distribution. It is only another will made by the Legislature for the intestate. If he could have devised it by will, then it passes by force of the statute to his widow—and no doubt he could have devised property in possession, or in remainder or in reversion, on whatever contingency it was held. So far there appears to be no difficulty. The only difference between the 1st section and the 2nd section is that the 1st deals with the case where the whole estate is not worth 500*l.*, and the 2nd with the case where it is worth more than 500*l.*, and the same rules apply to both. I do not think the 3rd section really assists one, and the 4th is not material. But the 5th section raises a difficulty, and gives room for an argument which has been strongly insisted upon. It tells us how the net value of the real estate is to be estimated—that is, the real estate which is to belong to the widow under s. 1. It is to be valued “in the case of a fee simple upon the basis of twenty years’ purchase of the annual value by the year at the date of the death of the intestate as determined by law for the purposes of property tax.” That is to be your guide in ascertaining what the annual value by the year is, and there are certain deductions to be made with which we are not concerned. You cannot apply that to anything but a property in possession, because that is the only property which has an annual value at the date of the death of the intestate as regards himself. It cannot mean the annual value payable to somebody else—at least it seems to me it would be wrenching the language to make it mean that. I think that what is to be valued is an estate in possession, and of that it is prescribed that the valuation is to be according to the tables and rules which are there referred to. The same tables and rules are also applied to the valuation of an estate for life or lives and there, again, you are dealing with an estate for life to which the intestate was entitled at the time of his death, not something which may come to him on a contingency. I follow the argument

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KEKEWICH against the widow's case to this extent that the only means  
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provided by the statute for valuing an estate are applicable to an estate in possession. But is that any reason for holding that only an estate in possession is contemplated by s. 1? It seems to me that the sound argument is just the other way. This only refers to the value of such estates as can be valued in this way. It does not mean that if there is anything which does not come within such rules and which cannot be treated in that way, therefore they shall not belong and be part of the real estate of the intestate. That view, I think, is supported by reference to s. 6, where there is no guide whatever given as to the value of the personal estate, excepting this, that you are to balance the gross value, when ascertained, against the debts and the testamentary expenses in order to ascertain the net value. Well, how do you ascertain the gross value? By consulting brokers, or actuaries, or other persons competent to advise the executors on the point to ascertain of what the estate consists. It seems to me here as regards s. 6 that if some item comes out worth nothing it will be entered as nothing in the account. You will have nothing on one side forming an item, as against the debts, funeral, and testamentary expenses on the other. If s. 5 does not apply, you must fix the value as well as you can by such other means as are available. If it is nothing, still that is an item in the account and comes in. I do not think, on a fair consideration of those sections—although, no doubt, they are of the narrow character which has been pointed out—that they can at all control the general words of s. 1, which says that the real and personal estates shall belong to his widow absolutely. There will therefore be a declaration that John Heath's share in the real and personal estate in question vested absolutely in his widow for such estate and interest as he had therein.

Solicitors for all parties: *Ikin & Crowther.*

G. M

*In re* WEDMORE.  
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[1898 W. 1834.]

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May 14.

*Administration—Will—Legacies—General or Specific—Insufficiency of Assets—Abatement—Legacy in Satisfaction of a Debt—Forgiveness of Debts.*

A testator gave to the trustees of his daughters' marriage settlement 3000*l.* in satisfaction of his covenant to pay them 1000*l.* He also forgave his children respectively all debts and sums of money which might be due from them to him at his death, and not secured by bond, bill, note, or other security. At the date of his death two of his sons owed him sums not secured as above mentioned. The estate proved to be insufficient for the payment of all the legacies in full. The question having arisen whether the legacy of 3000*l.*, which the legatee had elected to take, and the unsecured debts forgiven to the sons were liable to abate with the other general legacies:—

*Held*, that the principle by which a legacy given in satisfaction of dower was entitled to priority and did not abate was inapplicable to the case of a legacy given in satisfaction of an ascertained debt, and therefore the legacy of 3000*l.*, being a mere bounty, was liable to abatement.

But *held*, that the forgiveness of their debts to the sons amounted to specific legacies which were not liable to abatement.

PETITION.

The petition was presented by Thomas Frederick Wedmore, the plaintiff in the action, for the apportionment and distribution of certain moneys in Court to the credit of the action amongst the persons entitled to the pecuniary legacies given by the testator, Thomas Wedmore.

By his will, dated February 2, 1897, Thomas Wedmore, after giving various pecuniary legacies, bequeathed to the trustees for the time being of the settlement, dated February 7, 1876, made on the marriage of his daughter Rachel Elizabeth Barrett, the sum of 3000*l.* in satisfaction of his covenant that he would during his life, or within twelve calendar months after his death, pay to the trustees of the settlement the sum of 1000*l.*, with interest at 5*l.* per cent. until payment, to be held by them upon the trusts of such settlement in favour of

KEKEWICH R. E. Barrett and her husband and children. The testator also  
 J. provided as follows: "I forgive my children respectively all  
 1907 debts and sums of money which may be due from them respec-  
 WEDMORE, tively to me at my death, and not secured by bond, bill, note,  
*In re.* or other security." The testator died on February 5, 1897, and  
 WEDMORE his estate proved insufficient for the payment of all the legacies  
*v.* in full. At the time of his death there was due to the testator  
 WEDMORE. from one of his sons, the defendant Frank Hamilton Wedmore,  
 — a sum of 1887*l.* 1*s.* 2*d.*, and from another son, Cecil Wedmore,  
 the sum of 399*l.* 4*s.* 7*d.* Neither of these sums were secured  
 by bond, bill, note, or other security.

The questions raised upon the petition were (1.) whether the legacy of 3000*l.* given in satisfaction of the covenant by the testator was liable to abatement; and (2.) whether the unsecured debts of 1887*l.* 1*s.* 2*d.* and 399*l.* 4*s.* 7*d.*, due from the sons respectively, were liable to abatement with the general legacies.

The petitioner asked that these legacies should be treated as general legacies liable to abatement, and that the two sons should be ordered to pay into Court the amount by which such legacies were respectively to be abated.

*P. O. Lawrence, K.C.*, and *Percy Wheeler*, for the petitioner. As to the first question, this legacy of 3000*l.* given in satisfaction of the debt does not abate. It is in the same position as a legacy given in satisfaction of dower, which would not abate, according to the text-writers and the authorities: Williams on Executors, 10th ed. vol. ii. p. 1093; Theobald on Wills, 6th ed. p. 810; *Davenhill v. Fletcher* (1); *In re Saunders-Davies* (2); *In re Greenwood* (3); *Burridge v. Bradyl* (4); *Blower v. Morret* (5); *Heath v. Dendy* (6); *Norcott v. Gordon*. (7) These are nearly all cases of dower. Another case mentioned in the text-books in support of the proposition is *Bell v. Bell* (8), but the case which comes nearest to the present is *Davies v. Bush* (9), and Lord Lyndhurst in his judgment there says that if no debt were

(1) (1754) Amb. 244.

(5) (1752) 2 Ves. Sen. 420.

(2) (1887) 34 Ch. D. 482.

(6) (1826) 1 Russ. 543.

(3) [1892] 2 Ch. 295.

(7) (1844) 14 Sim. 258.

(4) (1710) 1 P. Wms. 127.

(8) (1872) Ir. R. 6 Eq. 239,

(9) (1831) You. 341,

really due the legatee could not be treated as a purchaser. KEKEWICH J. The only other cases referred to in the text-books are *Stahlschmidt v. Lett* (1) and *Acey v. Simpson* (2), both also cases of dower.

*Jessel, K.C.*, and *Austen-Cartmell*, for Frank H. Wedmore and another legatee in the same interest.

*Elgood and Lyttelton Chubb*, for other parties.

*R. Whitehead*, for Mrs. Barrett, the legatee entitled to the 3000*l.* The majority of the cases cited are cases of dower, and the principle underlying all those cases is that where there is dower there is a legal obligation binding upon the testator and his estate, including the property which he deals with by his will. If so, such a legacy has priority over those which are mere matters of bounty. Once the legal obligation is established, that creates a priority of right: *Heath v. Dendy*. (3) If there is not priority for the full 3000*l.* there is a right to priority for the 1000*l.* and interest, and the 2000*l.* only is liable to abatement. But I claim to take it as a whole, being entitled to elect.

*J. F. W. Galbraith*, for the trustees of Mrs. Barrett's settlement and other legatees. The trustees are entitled to the whole of this 3000*l.* There is a statement of the principle in *White and Tudor's Leading Cases in Equity*, 7th ed. vol. i. p. 841, to the same effect as in the other two text-books referred to. It occurs in the discussion of *Ashburner v. Macquire* (4), and he says, "Where a general legacy is given for any valuable consideration, as the relinquishment of dower by a widow, or of a debt actually due, it will be entitled to priority over all other merely voluntary legacies." There is no other authority upon the point. It is submitted that the amount of the consideration will not be considered, so long as there is consideration.

KEKEWICH J. This is a novel point in this sense, that no one has produced an authority which really bears directly upon it. One would have thought that it was a point which would have required a practical solution again and again. It can be simply stated. A testator, whose personal estate is insufficient for payment of all his legacies in full, gives to the trustees for the

(1) (1853) 1 Sm. & Giff. 421.

(2) (1842) 5 Beav. 35.

(3) 1 Russ. 543.

(4) (1786) 2 Bro. C. C. 108.

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KEKEWICH time being of the settlement made on the marriage of one of his daughters a sum of 3000*l.* in satisfaction of his covenant therein to pay 1000*l.* to them. Ought that legacy to abate with the other legacies, of which there are many? It is strange that the point is directly covered by dicta in two text-books which, though of course they are not authorities, are specially in the hands of practitioners, and are frequently referred to for guidance. In the last edition of Williams on Executors I find what is stated to be the general rule with respect to the abatement of legacies; and there he says at p. 1093: "This must be understood only as among legatees, who are all volunteers; for if there be any valuable consideration for the testamentary gift, as where a general legacy is given in consideration of a debt owing to the legatee, or of the relinquishment of any right or interest, as of her dower by a widow, such legacy will be entitled to a preference of payment over the other general legacies, which are mere bounties." The other text-book is Mr. Theobald's work on Wills, 6th ed.; and he says at p. 810: "As between general legatees, legacies given for valuable consideration, as for debts or instead of dower, have priority." Mr. Galbraith tells me that there is a similar statement to be found in another valuable work, namely, White and Tudor's Leading Cases in Equity, 7th ed. vol. i. p. 841, but no authority is there mentioned which is not to be found in the other two works to which I have referred. With the assistance of counsel I have referred to all the cases which the learned editors have cited, and not one of them decides the question as regards legacies given in satisfaction of debts. They do decide, and it must be taken to be established, that a legacy given to a widow in satisfaction of dower does not abate. But there is no case among all those authorities which really touches the question of debt. The only one which is reasonably near the point is the case of *Davies v. Bush* (1), to which I will presently refer. Is it possible to find in the cases any principle for the rule laid down as regards dower? There is no doubt that the judges before whom the point has come treat the widow as a purchaser of the legacy in giving up her dower, but that is hardly satisfactory as a principle. There is really no other. It has clearly been held from

(1) You. 341.

time to time that, first, something must be given up, and, secondly, as long as that is so, the Court will not inquire what the value of that something is. In the early case of *Davenhill v. Fletcher* (1) the Master of the Rolls (Sir Thomas Clarke) directed an inquiry whether the widow was entitled to any dower, and declared that if she was then she would have the legacy without any abatement. There was no inquiry directed as to the value of the dower. That is curiously illustrated by the case before Chitty J. of *In re Greenwood* (2), where his judgment entirely turned on this, that, as a matter of fact, although the testator had given legacies in satisfaction of dower, there was no dower to be satisfied. By the will in that case the testator had disposed of the real estate, which he was entitled to do, to his son, and he had by that disposition barred the widow's right to dower, and there was nothing to be satisfied. On that ground the legacy was held to have no priority because the widow gave up nothing. Now, as far as I can make out from the cases, the principle—if it can be called a principle—is expressed in the argument in *Davies v. Bush* (3), where counsel is reported to have said that “where a legacy is given to a woman in lieu of dower, the Court considers her a purchaser of the legacy, and will not look to the value of the dower.” That seems to be the foundation of the rule, whether it is strictly a principle or not. The claim for dower is one of a peculiar character, and it may well be that the Court came to the conclusion that the value of it cannot be easily determined; though it is a right of such sufficiently distinct character that it would, perhaps, be wrong to say it cannot be valued at all. If that is right, is there any reason for extending the rule to the case of debts? I have already referred to the case of *Davies v. Bush* (3) as the only one that purports to extend it, but when you look into that decision it does not go so far. Lord Lyndhurst does not decide the point, and he expresses the opinion in language which entirely relieves me from treating it as a binding authority here. There the legacy was given in release of a right of account. There had been an account between the testator and a legatee,

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(1) Amb. 244. (2) [1892] 2 Ch. 295.

(3) You. 341.

KEKEWICH and the Court was satisfied that it was not worth while taking an account because nothing was due to the legatee, whose case fell through for that reason; and the Lord Chief Baron says (1):

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 WEDMORE, *In re.* “If no debt were due, and the release was required merely for the sake of peace, then, unquestionably, the legatee cannot be treated as a purchaser.” That is exactly on the same lines as the decision of Chitty J. in *In re Greenwood*. (2) And he goes on: “If any debt were really due, then I am inclined to think that the present comes within the principle of those cases which have been cited.” He does not decide that it was; he only expresses an indication of his opinion. How can I bring a case of this kind within the rule? This is a legacy in satisfaction of an ascertained debt. There is no doubt that in one sense the legatee may be considered a purchaser. If he elects to take under the will, he gives up the debt and takes the legacy, but still it is not at all like the case of a legatee taking a legacy in lieu of a right to dower out of land. We know precisely what the debt was—it was 1000*l.* We also know precisely what the legacy was—it was 3000*l.*, payable to the same persons; but it seems to my mind impossible to apply to that state of circumstances the considerations which apply to a case of dower. The legatee elects to take the larger sum and gives up the debt, and in taking the larger sum the legatee takes it by way of bounty. She says, in effect, “Rather than insist upon my covenant I will accept the testator’s bounty.” I cannot see myself how legacies accepted in that way differ in any way from other general legacies which are mere bounties. In saying that I have practically decided a by-point which must not be overlooked, as it was argued, namely, that the legatee must be considered to have taken the 1000*l.* as debt and 2000*l.* only as bounty; but that distinction cannot be upheld. The debt has gone in exchange for the legacy, and the legatee takes the whole 3000*l.* as a legacy. The result is, no doubt, that she loses something out of the debt of 1000*l.* She might have avoided that by electing to claim against the will, but she claims under the will, and she takes the whole legacy subject to the usual rules of administration which affect all legacies. There will be

(1) You. 343.

(2) [1892] 2 Ch. 295.

a declaration that this legacy abates, with the other general legacies, rateably.

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The second question as to the forgiven unsecured debts was then argued.

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*P. O. Lawrence, K.C.*, and *Percy Wheeler*, for the petitioner. The debts of the two sons are not specific but general legacies, and abate. What the testator has done is to give directions to the executors to pay out of the testator's estate so much as will enable them to discharge the debts owing to his estate. *Izon v. Butler* (1) is a somewhat similar case. There the words were "remit and forgive." The forgiveness of a bond-debt is a legacy, and as such liable to the payment of legacy duty: *Attorney-General v. Holbrook*. (2)

*Elgood*, for another legatee in the same interest, referred to *Vickers v. Pound* (3) as throwing some light upon the question.

*Jessel, K.C.*, and *Austen-Cartmell*, for *F. H. Wedmore*. This is a bequest of a specific legacy being part of the testator's estate. The release of an interest is equivalent to a specific legacy. There is no real difference between what is forgiven and what is given: *Smallman v. Goolden* (4); *Sidney v. Sidney*. (5)

*Lyttelton Chubb*, for *Cecil Wedmore*.

KEKEWICH J. To my mind it is purely a question of construction as to what is the meaning of the words "I forgive my child all debts and sums of money due from him on my death, and not secured by bond, bill, note, or other security." I use the singular number for the sake of simplicity. I cannot see myself any substantial difference between what I have just read and "giving" the debt due from another, merely because the former is in the nature of a surrender or release. It really is a gift to the child of what he owes, so that he would not be bound to pay the debt to the executors of the testator. If the testator gives to one of his children, or even to a stranger, that which is due from someone else, that would be specific, and must be set apart and

(1) (1815) 2 Price, 34, 43.

(3) (1858) 6 H. L. C. 885.

(2) (1829) 3 Y. & J. 114.

(4) (1787) 1 Cox, 329.

(5) (1873) L. R. 17 Eq. 65.



KEKEWICH appropriated. Supposing that, instead of giving it to his son or to a stranger, he forgives the debt which is due from a son, is there any difference? It seems to me that in substance there is none.

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WEDMORE, *In re.* These legacies must therefore be declared to be specific, and not liable to abatement.

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WEDMORE. Solicitors: *George Brown, Son & Vardy; Robbins, Billing & Co.; Arber & Lewis, for Press & Press, Bristol; Grubbe & Troughton, for Salisbury & Griffiths, Bristol.*

G. M.

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EADY J.

## BARCLAY &amp; CO., LIMITED v. POOLE.

[1906 B. 677.]

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June 13. *Ship—Shares—Equitable Interests—Unregistered Mortgage—Contract to sell Shares to Part-owner without Notice—Purchaser to apply Part Purchase-money in discharging Vendor's Debt to Ship—Registered Transfer—Mortgagee's Right to stop Application of Purchase-money—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 33, 56, 57.*

The managing owner of a ship contracted to sell shares of which he was registered owner to other part-owners, who were to apply the purchase-money in discharging the vendor's debt to the ship and pay the balance to the vendor. The shares were forthwith transferred to the purchasers by registered bill of sale. After the contract and transfer, but before the purchase-money was paid or applied, the purchasers received notice of an unregistered mortgage prior in date to the contract. In an action by the mortgagees to stop the entire purchase-money:—

*Held*, that as s. 56 of the Merchant Shipping Act, 1894, enabled the vendor as registered owner, not only “absolutely to dispose” of the shares, but also “to give effectual receipts” for the purchase-money, it enabled him to enter into a valid contract as to the application of the purchase-money, and therefore the purchasers' contractual right to apply part of the purchase-money in discharge of the vendor's debt to the ship, a right in which as part-owners they were pecuniarily interested, took precedence over the prior unregistered mortgage.

*Black v. Williams*, [1895] 1 Ch. 408, 421, applied.

## WITNESS ACTION.

By a mortgage of May 30, 1902, Anthony Hedgeley Poole, the managing owner of the steamship *Gleno*, mortgaged twenty sixty-fourth shares, of which he was registered owner, to his bankers the plaintiffs to secure his current account, but at his request the mortgage was not registered.

The other shares were then held as follows, viz.: James Alfred Poole was the registered owner of twelve shares; Robert Emmerson was the registered mortgagee of twenty shares, which, being mortgaged for more than their value, were subsequently transferred to him as absolute owner; and the remaining twelve shares were held by various other persons.

Prior to February 8, 1906, Anthony Hedgeley Poole had incurred debts on behalf of the ship and the owners to the amount of 483*l*. He had left these debts unpaid, although he had received about 636*l*. on account of the ship and the owners. He was in pecuniary difficulties, and with the object of making good the 636*l*., and so putting the ship and the owners in funds for payment of the ship's debts with a balance of 153*l*. to the good, the following agreement was entered into.

By this agreement, dated February 8, 1906, and made between Anthony Hedgeley Poole (hereinafter called the vendor) of the one part and James Alfred Poole and Robert Emmerson (hereinafter called the purchasers) of the other part, it was agreed that—

(1.) The vendor should sell, and the purchasers should purchase, twenty shares in the said ship.

(2.) The purchase price should be a sum to be determined as the fair market price of the said shares on February 8, 1906, by a valuer. (This price was assessed on March 7, 1906, at 937*l*.)

(3.) The purchase price should be paid as follows, viz.: By the payment by the purchasers of all moneys not exceeding in the aggregate the amount of the said purchase-money owing by the vendor to the owners of the said ship or owing by the vendor, as managing owner, to creditors of the owners of the said ship (and any overdraft or other moneys owing by the vendor to bankers for which the owners of the said ship were or might become liable), and as to the balance by payment within three months from the date thereof in cash to the vendor.

(4.) The vendor should forthwith execute a legal bill of sale of the said shares free from incumbrances to the purchasers.

There was, in fact, no overdraft by the vendor for which the owners could become liable within the bracketed words in clause 3.

In pursuance of this agreement the vendor transferred the

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twenty shares to the purchasers by a bill of sale dated February 8, 1906, and registered February 10, 1906.

At the date of this transaction the purchasers had no notice of the plaintiffs' mortgage.

The plaintiffs first heard of the transfer on February 14, 1906. On February 15, 1906, they tendered their mortgage for registration, but registration was refused on the ground of the previous registration of the bill of sale. On the same day they gave the purchasers' solicitors notice that they claimed priority for their mortgage, and that they would hold the purchasers responsible if they advanced or paid the purchase-money in respect of the said shares.

On February 19, 1906, the plaintiffs, whose claim was over 1000*l.*, commenced this action against the vendor and the purchasers for an account of what was due under the mortgage, payment by the vendor of the amount found due, enforcement of the mortgage by foreclosure or sale on the footing that the plaintiffs had priority over the purchasers, and in the alternative a charge on the purchase-money.

The vendor did not enter an appearance. The purchasers relied (*inter alia*) on the provisions of the Merchant Shipping Act, 1894. They had, in fact, made good the 636*l.* out of the 937*l.* purchase price after notice of the plaintiffs' claim, leaving a balance of 301*l.* in their hands, which, subject to deduction of costs, they were ready to pay to the plaintiffs. The ship's debts had all been discharged out of the 636*l.*

*Eve, K.C.*, and *Martelli*, for the plaintiffs. Having regard to the provisions of ss. 33, 56, and 57 of the Merchant Shipping Act, 1894, it must be admitted that the purchasers acquired a valid title to the shares. But the plaintiffs were entitled to stop the purchase-money. Sect. 33, which re-enacts s. 69 of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), provides that "If there are more mortgages than one registered in respect of the same ship or share, the mortgagees shall, notwithstanding any express, implied, or constructive notice, be entitled in priority, one over the other, according to the date at which each mortgage is recorded in the register book, and not according to the date

of each mortgage itself." Sect. 56, which re-enacts s. 43 of the Merchant Shipping Act, 1854, provides that "No notice of any trust, express, implied, or constructive, shall be entered in the register book or be receivable by the registrar, and, subject to any rights and powers appearing by the register book to be vested in any other person, the registered owner of a ship or of a share therein shall have power absolutely to dispose in manner in this Act provided of the ship or share, and to give effectual receipts for any money paid or advanced by way of consideration." Sect. 57, which re-enacts s. 3 of the Merchant Shipping Act Amendment Act, 1862 (25 & 26 Vict. c. 63), provides that "The expression 'beneficial interest,' where used in this part of this Act, includes interests arising under contract and other equitable interests; and the intention of this Act is, that without prejudice to the provisions of this Act for preventing notice of trusts from being entered in the register book or received by the registrar, and without prejudice to the powers of disposition and of giving receipts conferred by this Act on registered owners and mortgagees, and without prejudice to the provisions of this Act relating to the exclusion of unqualified persons from the ownership of British ships, interests arising under contract or other equitable interests may be enforced by or against owners and mortgagees of ships in respect of their interest therein in the same manner as in respect of any other personal property." Sect. 56 no doubt prevented us from claiming the shares, but s. 57 preserved our equitable right to stop the purchase-money.

[SWINFEN EADY J. This was not a case where the vendor could do what he liked with the purchase-money. It was bound by the contract, and the purchasers had a direct pecuniary interest in its application according to the contract.]

The purchasers only had a direct pecuniary interest in discharging their own personal liability for the 483*l.* ship's debts. They were not entitled to make good the whole 636*l.* That was merely relieving the vendor from his liability to the ship.

[SWINFEN EADY J. It was the purchasers' interest to see that the whole liability was discharged. Otherwise they would have

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sustained a rateable loss as part-owners. The contract was not limited to the discharge of their personal liability.]

The plaintiffs' equity was prior to the purchasers' equitable rights under the contract.

[SWINFEN EADY J. The contract cannot be split into two parts. The purchasers bought and obtained a good legal title to the shares. They were entitled to keep them, and if they did they were bound and entitled to apply the purchase-money according to the contract.]

When the purchasers received notice of the plaintiffs' mortgage they knew that the purchase-money could not be properly applied according to the contract. They ought to have repudiated the contract and given up the shares.

*Micklem, K.C.*, and *A. A. Roche*, for the purchasers. The vendor, as registered owner, had power to dispose of the shares and to give an effectual receipt for the purchase-money. He had, therefore, power to direct part of it to be applied in discharging his debt of 636*l.* to the owners, including the purchasers. It was really a case of set-off. After paying this sum there is a balance of 301*l.* payable to the vendor, and that balance, subject to the purchasers' costs of action, must no doubt be paid to the plaintiffs. Sect. 3 of the Merchant Shipping Act Amendment Act, 1862 (re-enacted by s. 57 of the Merchant Shipping Act, 1894), was passed in consequence of the decision in *Liverpool Borough Bank v. Turner* (1), where it was held that the Court could not recognize equitable titles in the case of ships. The section compelled the recognition of equitable titles, but not in such a way as to interfere with the registered owner's legal rights conferred by other sections: *Black v. Williams*. (2) Sect. 57 is expressly "without prejudice to the powers of disposition and of giving receipts conferred by this Act on registered owners." That obviously refers to the powers in s. 56.

*Eve, K.C.*, in reply. *Black v. Williams* (2) is conclusive as to the purchasers' legal right to the shares, which is not disputed, but it does not touch the question of the plaintiffs' right to stop

(1) (1860) 1 J. & H. 159; 2 D. F. & J 502.

(2) [1895] 1 Ch. 408, 421.

the purchase-money. In *The Benwell Tower* (1) it was held that the principle of *Hopkinson v. Rolt* (2) applied to registered mortgages of ships, so that a first mortgagee whose mortgage covered further advances could not claim priority for advances made after notice of a second registered mortgage. This shews that ordinary equitable principles apply except where precluded by the registration sections. The present contract does not amount to a set-off. It is nothing more than an equitable assignment of the purchase-money by the vendor, and it is therefore subject to his prior mortgage to the plaintiffs.

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SWINFEN EADY J. (after stating the facts). It is not disputed that the 301*l.* balance cannot be paid to the vendor, but must be paid to the plaintiffs. The dispute is in reference to the 636*l.* The plaintiffs claim that, as they gave the purchasers notice of their unregistered mortgage before the 636*l.* part purchase-money was applied pursuant to the agreement, the purchasers had no right so to apply it, but the plaintiffs had priority, and the 636*l.* ought to have been paid to the plaintiffs, and not to the persons provided for by the agreement, and if in fact it has been so paid, after notice of the plaintiffs' claim, the plaintiffs are not prejudiced, and it must be paid over again. A little over 1000*l.* is owing to the plaintiffs, and it is not disputed that if their claim is well founded they would take the whole purchase-money.

Now it cannot be disputed that the purchasers acquired a valid title to the shares. They took an absolute registered bill of sale without notice of any prior charge, and their title to the shares is absolute. But it was part of the contract under which they bought the shares that a part of the purchase-money should be applied in discharging the vendor's debt to the ship, and each of the purchasers was pecuniarily interested in that portion of the purchase-money being so applied. The owner of every share was obviously interested in the vendor's debt of 636*l.* being discharged. If no portion of that sum had been recovered, the owners would have had to pay

(1) (1895) 8 Asp. M. L. C. 13; 72 L. T. 664.

(2) (1861) 9 H. L. C. 514.

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the 483*l.* ship's debts themselves, and the ship would have lost 153*l.*, the balance of the vendor's debt. Each purchaser was therefore pecuniarily interested in this provision of the contract being carried out by applying the 636*l.* in discharge of the vendor's debt.

The plaintiffs really sought to divide the contract into two parts, and contended that, though the purchasers acquired a good title to the shares, they had no right to apply the purchase-money in reduction of the vendor's liability to the ship, because the plaintiffs' title to the purchase-money under their unregistered mortgage was prior in date to the contract.

This contention is not well founded. The purchasers were entitled to deal with the vendor on the footing that he was absolute owner of the shares, and absolute owner and master of the purchase-money, and competent to give a good receipt in discharge for it. If he could give a valid discharge for the purchase-money, he could validly contract as to the way in which it was to be applied.

Now, s. 56 of the Merchant Shipping Act, 1894, provides that, "subject to any rights and powers appearing by the register book to be vested in any other person, the registered owner of a ship or of a share therein shall have power absolutely to dispose in manner in this Act provided of the ship or share, and to give effectual receipts for any money paid or advanced by way of consideration."

If, therefore, the registered owner can give effectual receipts for any money paid or advanced, he can effectually dispose of the purchase-money and direct how it is to be paid or applied. This contract is not severable into two parts. It is one entire contract, and the purchasers, having bought the shares and agreed to pay the purchase-money, a portion of which was to be applied for their benefit in a particular way, are entitled to insist upon the whole contract being carried out, and their right so to insist is an absolute right given by the statute.

The plaintiffs suggested that the proper course for the purchasers after notice of the plaintiffs' claim would have been to abandon their right to the shares, and to treat the contract as

one that ought to be rescinded, leaving the shares to the vendor or the plaintiffs.

I cannot accept that view. It would be acting quite contrary to the purpose and object of the Act, as explained by Vaughan Williams J. in *Black v. Williams*. (1)

The purchasers' right to have the purchase-money applied pursuant to the contract is valid, and takes precedence over the plaintiffs' unregistered mortgage.

There will therefore be a declaration that, notwithstanding the notice of the plaintiffs' prior unregistered mortgage, the purchasers were entitled to apply 636*l.*, part of the 937*l.* purchase-money, in discharging the vendor's debt to the ship. The purchasers will retain their taxed costs out of the 301*l.* balance and pay the residue to the plaintiffs.

Solicitors: *King, Wigg & Co., for Clayton & Gibson, Newcastle-upon-Tyne; Botterell & Roche, for Botterell, Roche & Temperley, Newcastle-upon-Tyne.*

(1) [1895] 1 Ch. 408, 421.

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[1905 N. 231.]

*June 24, 25, Receiver—Partition Action—Sale by Mortgagee with Sanction of Court—Purchase by Receiver without Sanction.*  
26.

A receiver appointed by the Court cannot purchase the property of which he is receiver without the sanction of the Court, even where the sale is made, not under a decree in the action, but by a mortgagee selling with leave outside the action.

*Allen v. Bond*, (1841) Fl. & K. 196, 213, followed and applied.

WITNESS ACTION.

This was an action for partition or sale of a house at Hove, and for other relief. The house was subject to a mortgage for 2800*l*.

The title to the various shares was in dispute. The writ was issued on February 15, 1905.

On May 8, 1905, the defendant, a part-owner, was appointed receiver of the rents and profits without salary.

On November 29, 1905, the mortgagee, whose interest was in arrear, obtained an order giving her liberty, as mortgagee (notwithstanding the appointment of the receiver), to enter and take possession and to receive the rents and profits, and to exercise her powers of sale by public auction and to lodge the proceeds of sale in Court after deducting principal, interest, and costs.

The mortgagee did not take possession, but after valuing the house put it up for sale by auction on January 17, 1906.

The defendant, without obtaining the leave of the Court, instructed an agent to bid, and bought the house for 3500*l*.

The purchase was completed in March, 1906, and the balance of the purchase-money, about 380*l*., was paid into Court by the mortgagee.

The evidence as to title shewed that three-fourths of the house belonged to the three plaintiffs and one-fourth to the defendant.

The defendant, however, claimed to retain the house under her purchase at the auction.

The facts, arguments, and judgment on this point are alone reported.

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*Eve, K.C.*, and *J. Samuel Green*, for the plaintiffs. A receiver appointed by the Court is absolutely debarred from purchasing the property of which he is receiver for his own benefit unless he obtains the sanction of the Court: *Alven v. Bond*. (1)

*Hon. E. C. Macnaghten, K.C.*, and *Bischoff*, for the defendant. In *Alven v. Bond* (1) the sale was under a decree in the action, so that the receiver had some control. In the present case the sale was by a mortgagee outside the action. The receiver had no control whatever. The mortgagee had simply to sell and pay the balance into Court. For the purpose of this sale the receiver was an absolute stranger, without any duties or advantages to prevent her bidding. The fact that she was a tenant in common is of course immaterial: *Kennedy v. De Trafford* (2); *In re Biss* (3); and it is not relied on.

*Eve, K.C.*, in reply. The receiver had certain duties in regard to the sale. Although she had not the conduct, it was her duty to see that the sale was properly carried out. The fact that the mortgagee was selling outside the action made it all the more imperative for the receiver to perform this duty in order to protect the owners of the equity of redemption. Assuming that *Alven v. Bond* (1) is right, the present case follows a fortiori.

SWINFEN EADY J. (after dealing with other points in the case). There is still a further point. The defendant contends that, though she was receiver when she purchased the house at the auction, she can still keep it as her own. This contention is not well founded. A receiver appointed by the Court cannot purchase property of which he is receiver without the sanction of the Court. That question has arisen directly in Ireland in *Alven v. Bond*. (1)

(1) Fl. & K. 196, 213.

(2) [1897] A. C. 180.

(3) [1903] 2 Ch. 40.

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In that case a receiver was appointed in a foreclosure action. There was a decree for sale. The property was sold by auction under the decree and bought by a third person, who as to one third share purchased as trustee for the receiver. After the sale had been opened on other grounds under the old practice and then confirmed by the Court, the facts were ascertained, and an application was made by certain beneficiaries to set aside the sale on the ground (*inter alia*) that it was a sale as to part in trust for the receiver.

Sir Michael O'Loughlen M.R. said: "It remains to be considered whether the Court ought, after the confirmation of a sale under a decree, to set aside such sale, and direct a resale at the instance of the owners of the estate, on the ground that the purchase was made by or in trust for the receiver in the cause, the leave of the Court to bid at such sale not having been obtained by him. I am of opinion that the Court ought to do so; I think that it would be very dangerous to allow a person, who has so much control over the property, as a receiver of the Court must necessarily have, such opportunities of acquiring a knowledge of the circumstances and value of it, which may not be easily attained by others, who may be, as in the present case, employed in the preparation of the rental to be used at the sale, (which everyone knows to be one of the most important documents used on such an occasion,) to become the purchaser of the estate without the sanction or knowledge of the Court. . . . Very great powers are given to, and much confidence placed in this officer, who is placed in a situation which would enable him, if inclined to act dishonestly, by reducing the rental or lettings under the Court, or otherwise, to bring to a sale under very disadvantageous terms, the property confided to his care, and thus become the purchaser at an undervalue. I might put many instances in which a receiver might avail himself of the power given to, and the trust reposed in him, to procure a purchase at an undervalue of the estate confided to his management; and I have no doubt, that principles of public policy require, that he should not be permitted to bid at a sale under a decree, except under some special order obtained with notice to the parties interested, and probably with their consent."

The language of Sir Michael O'Loughlen M.R. is of general application. It is based on general principles, and applies equally to a case where the sale is not under a decree in the action, but is a sale by a mortgagee under a power of sale. In the present case the mortgagee, having obtained leave to enter into possession and sell, advertised the property for sale; but it does not appear that the mortgagee entered into possession, and certainly there was no order discharging the receiver. The defendant continued to be receiver, and it would be exceedingly dangerous to allow a receiver, who has a position of advantage in obtaining full particulars of the property and its value, who manages any letting, and whose business it is to protect the property for the benefit of all parties concerned, to go without their knowledge and bid for the property at an auction and acquire it for himself. If he wishes to become the purchaser, his duty is either to be discharged from his position as receiver, or to obtain leave in the action in which he is receiver to bid at the sale. Otherwise he cannot bid and acquire the property.

The defendant must therefore be treated as having purchased the house on behalf of the beneficiaries. She is entitled to a charge for the purchase-money and 4 per cent. interest, but, subject to that charge, she must hold the house on trust for the plaintiffs and herself in equal fourths.

By consent a sale in the action with the sanction of the judge in chambers was ordered.

Solicitors: *Greenwood & Greenwood; Hicks, Arnold & Mozley.*

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TON J.

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May 30,

*In re* LEWIS.

DAVIES *v.* HARRISON.

[1907 L. 319.]

*Will—Construction—Tenant for Life and Remainderman—Power to postpone Conversion — “Property not actually producing Income” — Mortgage deferring Payment of Interest.*

Testator by his will devised and bequeathed his residuary real and personal estate to trustees upon trust for sale and conversion and investment, and directed them to pay the income of the investments to his wife for life. The will empowered the trustees to postpone conversion, and provided that the income of unconverted estate should be applied as if it arose from converted estate, and that no property not actually producing income should be treated as producing income or as entitling any person to the receipt of income. The testator died in 1901. Amongst the securities forming part of his estate at his death was a mortgage which recited that the mortgagor was indebted to the testator in a certain sum and that it had been agreed that the payment of his debt should be postponed; and the mortgagor thereby covenanted to pay the amount of the debt with simple interest at his death, and if the aggregate amount of such sum and interest was not then paid, to pay interest on such aggregate sum by equal half-yearly payments, the first of such payments to become due six months after his death. The mortgagor died in 1906, in the lifetime of the testator's widow, the tenant for life. The widow died shortly afterwards:—

*Held*, that the interest on the mortgage attributable to the period between the death of the testator and the death of the mortgagor belonged to the estate of the widow, and not to that of the testator.

*In re Hubbuck*, [1896] 1 Ch. 754, applied.

#### ADJOURNED SUMMONS.

Samuel Lewis, by his will dated September 12, 1900, after numerous bequests, devised and bequeathed all his real and personal estate not otherwise disposed of to his trustees upon trust for sale, conversion and investment, and directed his trustees to pay the income of his residuary estate to his wife for life; and after her death he declared that his trustees should stand possessed of one equal third part of his residuary estate and the income thereof in trust for such persons as his wife should by will or codicil appoint, and of the remaining two equal third parts

in trust for numerous charities and charitable institutions, including the Prince of Wales' (now King Edward's) Hospital Fund for London. By clause 40 of his will the testator empowered his trustees to postpone the sale, conversion and collection of the whole or any part of his real and personal estate; and he declared "that the income produced from every or any part of my residuary real or personal estate previous to the conversion or collection thereof pursuant to the trusts hereinbefore declared shall be applied in the same manner in all respects as if the same were income proceeding from such investments as are hereinbefore directed or authorized and that the whole of the income produced by my residuary real and personal estate in its actual condition or state of investment for the time being whether proceeding from property or investments of an authorized or of an unauthorized description and whether of a permanent or a wasting character shall as well during the first year from my decease as at all times afterwards be applicable as income under the trusts of this my will no part thereof being in any event liable to be retained as corpus or capital. But no reversion or other property not actually producing income which shall form part of my estate shall under the doctrine of constructive conversion or otherwise be treated as producing income or as entitling any party to the receipt of income."

The testator died on January 13, 1901.

The testator's widow married again in July, 1904, and died on October 13, 1906, having made a will appointing executors.

Amongst the securities forming part of the estate of the testator at the date of his death was a mortgage dated June 1, 1888, and made between W. G. Craven of the first part, G. Bonnor of the second part, and the testator of the third part. The mortgage contained a recital that "Whereas the said W. G. Craven was on the 10th day of August last indebted to the said S. Lewis in the sum of 18,042*l.* 10*s.* 4*d.* (part of a larger sum) and the said W. G. Craven having been pressed for payment thereof but being unable to pay the same it was agreed by a memorandum in writing dated the 10th day of August afore-said that the payment thereof should be postponed in manner hereinafter mentioned upon the said sum and interest thereon

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being secured in manner hereinafter mentioned." It was then witnessed that "in pursuance of the said agreement in this behalf and in consideration of the said sum of 18,042*l.* 10*s.* 4*d.* so owing as aforesaid and of the premises the said W. G. Craven doth hereby covenant with the said S. Lewis that he the said W. G. Craven his executors administrators or assigns will on the death of him the said W. G. Craven or his son the said A. W. Craven whichever event shall first happen pay to the said S. Lewis his executors administrators or assigns the sum of 18,042*l.* 10*s.* 4*d.* together with simple interest thereon at the rate of 5 per cent. per annum reckoned from the 10th day of August 1887 up to the time of such death and if the aggregate amount of such sum and interest or any part thereof shall not then be paid then and in such case and so long as the same aggregate sum or any part thereof shall remain unpaid will pay to the said S. Lewis his executors administrators or assigns interest for the said aggregate sum or for the unpaid part thereof for the time being at the rate of 5 per cent. per annum by equal half-yearly payments the first of such payments to become due and be made at the expiration of six calendar months from the death of the said W. G. Craven or A. W. Craven whichever event shall first happen and will make all the said payments hereinafter covenanted to be made without any deduction whatsoever."

The 18,042*l.* 10*s.* 4*d.* secured by the mortgage was during the lifetime of the testator reduced by the payment in 1897 of a sum of 1500*l.* to 16,542*l.* 10*s.* 4*d.*, but no interest on the original sum or any part thereof was paid to the testator during his life.

W. G. Craven died on January 2, 1906, and thereupon the principal sum of 16,542*l.* 10*s.* 4*d.* and the interest thereon, which amounted to 15,936*l.* 4*s.* 10*d.*, became payable. These sums had not in fact been paid, but it was admitted that they would be so paid in full.

The present summons was taken out by the trustees of the will for the determination of the question (inter alia) whether so much of the interest on the mortgage debt as was attributable to the period between the date of the death of the testator and

that of the death of W. G. Craven formed part of the testator's or of the widow's estate.

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*H. Terrell, K.C., and E. S. Ford*, for the summons.

*Rowden, K.C., and G. F. Hart*, for the executors of the widow's will. The widow's estate is entitled to interest for the period between the date of the testator's death and that of Craven's death: *In re Hubbuck*. (1) The question is, Has the security produced income during that period? Interest on the mortgage debt was running, although not payable until a deferred date. If the trustees had sold the debt and invested the proceeds the widow would have been entitled to the income of the investments during her life. She was therefore entitled to the income of the debt, notwithstanding that the trustees, in the exercise of their discretion, did not sell it. The action of the trustees could not affect her rights. It cannot be said that this debt is not an income-bearing fund.

[WARRINGTON J. Is this income produced under clause 40 of the will? The testator could have received nothing himself. In *In re Hubbuck* (1) the debt was due, and it was a mere accident that it was not paid.]

The interest was accruing due, though not payable until a future date, and, if so, the debt in respect of which it accrued due was an income-producing fund. The interest accrued due from day to day, and was debitum in presenti although solvendum in futuro. Nothing is postponed in the covenant except the payment of interest. The express provision for capitalizing the interest as from the date of Craven's death prevents the interest prior to that date from being regarded as converted into capital for any purpose.

[WARRINGTON J. Does not s. 2 of the Apportionment Act, 1870, help you? Interest on money lent is considered as accruing from day to day although payable at intervals. Independently of that Act, interest on money lent was always apportionable, as is shewn by the recital to the Act.]

The aggregate sum coming to the trustees really consists of two funds, the one representing capital and the other interest.

(1) [1896] 1 Ch. 754.



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Neither the postponement clause nor any other clause in the will can have the effect of giving the latter to the remaindermen except to the extent to which it represents interest accrued during the testator's lifetime.

[They also referred to *In re Rogers' Trusts*. (1)]

*Cave*, K.C., and *Howard Wright*, for King Edward's Hospital Fund for London, one of the residuary legatees. The whole sum which became payable on Craven's death is, it is submitted, corpus and forms part of the testator's estate. The covenant in the mortgage deed treats the principal and interest as forming one aggregate sum to be paid at a future date. It was a reversionary debt with reversionary interest. The question is whether under the rules of the Court, and on the construction of the will, it can be said that income was produced during the period between the date of the mortgage and the death of Craven. It is submitted that it cannot be so said. Where there is a power to postpone conversion which is exercised by trustees a tenant for life does not get income in respect of non-income-producing property. He takes the rough with the smooth: *Mackie v. Mackie* (2); *Rowlls v. Bebb*. (3) The whole point in *In re Hubbuck* (4) was that the mortgagor there owed the money in the ordinary sense. Was the interest in the present case actually produced in any sense before it became due? It was, it is submitted, a reversionary sum which did not produce income until it became an aggregate sum on the death of Craven. The Court has to construe clause 40 of the will. The testator bargained with the debtor that the debt was not to be paid until after the expiration of a period which might largely exceed the length of the testator's lifetime. Knowing of the existence of this debt, and that the interest in respect of it was not payable until the happening of a certain event, he made his will, in which he used the word "income." He cannot, it is submitted, by that word have intended to include interest which was not then payable.

[They also referred to *In re Atkinson*. (5)]

(1) (1860) 1 Dr. & Sm. 338, 341.

(2) (1845) 5 Hare, 70, 78.

(3) [1900] 2 Ch. 107, 114.

(4) [1896] 1 Ch. 754.

(5) [1904] 2 Ch. 160.

WARRINGTON J. The question in this case is whether the tenant for life under the testator's will is entitled to interest between the date of the testator's death and January 2, 1906, on a certain sum of money which became payable on January 2, 1906, with interest from a date anterior to the testator's death. [His Lordship stated the facts, observing that the recital in the deed of June 1, 1888, clearly shewed that the parties, at that time, treated W. G. Craven as debtor, and the testator as creditor, for 18,042*l.* 10*s.* 4*d.*, and that they intended to postpone payment of the debt; and also that it was noticeable that, in the trust which was imposed upon the mortgagee in regard to moneys which he might realize under the security, the money which the mortgagee might be entitled to retain was described as the "principal sum of 18,042*l.* 10*s.* 4*d.* and all interest in respect thereof." He continued :—] The question is whether the tenant for life under the testator's will was entitled to so much of the sum paid for the period between August 10, 1887, and January 2, 1906, as represented interest for the period between January 13, 1901, and January 2, 1906. Did the property within the meaning of clause 40 of the will produce income between January 13, 1901, and January 2, 1906? That is the question I have to determine. "Interest," to use the word in the mortgage deed, has been produced during that period, because the mortgagor's representatives have now paid, or are going to pay, off the mortgage. It has been produced, but has it been produced during the lifetime of the tenant for life so as to entitle her estate to receive it? The words of clause 40 are, "no reversion or other property not actually producing income which shall form part of my estate shall under the doctrine of constructive conversion or otherwise be treated as producing income or as entitling any party to the receipt of income." Nothing is there said as to the lifetime of the tenant for life. All that the clause is aimed at is to prohibit the tenant for life receiving income in respect of property which did not in fact produce income. But this property has produced income, and the only question is whether the tenant for life was entitled to the income although it was not actually produced in her lifetime.

The point is not wholly without authority. The case of

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*In re Hubbuck* (1) is to some extent in point. In that case the will of the testator was to all intents and purposes identical with the will in the present case. The testator died in 1890; and at the time of his death one Hart was indebted to him in a sum of 3500*l.* The trustees of the will, being unable to obtain from Hart payment of this debt, in 1892 took from him as security for it a third mortgage upon certain policies of assurance on his life. Hart died in the lifetime of the tenant for life under the will, and the trustees, who had received neither principal nor interest in respect of the debt, realized their security, with the result that, after payment of the prior charges, they received a sum which was insufficient to pay the capital of Hart's debt, irrespective of the arrears of interest. The case came before the Court of Appeal from Stirling J., who had decided against the claim of the tenant for life to arrears of interest, and the Court held that the sum received by the trustees, although less than the amount of the principal debt, must be treated as representing arrears of interest as well as the capital, and that so far as it represented arrears of interest the debt had produced income. The way in which Lindley L.J. puts it, after stating the facts as I have done, is this (2): "In that state of things, but for this clause in the will, so much of that money as represents income would go to the tenant for life, and the security would have actually produced it. It produces the money, and if some of the money has to be treated as income it produces income." Kay L.J. puts it in this way (3): "As I have said already, this sum was realized while she was his widow, and the whole arrear of income is an arrear of income which accrued due while she was a widow"—and it is on that that the distinction, if any, in the present case is founded—"Therefore, *prima facie*, it cannot for a moment be denied that the widow, as the tenant for life, was entitled to so much of this sum as represents income. Is there anything in this will which alters that? If there be, the effect of it is, as has already been said, to give to the remaindermen that which is income, and which *prima facie* belongs to the widow. Where is there anything in this will which does that? The clause relied

(1) [1896] 1 Ch. 754.

(2) [1896] 1 Ch. 759.

(3) [1896] 1 Ch. 760.

on is in these words: 'But no property not actually producing income which shall form part of my estate shall be treated as producing income or as entitling any party to the receipt of income.' Did this sum produce income or not? Here is this sum realized during the lifetime of the widow and tenant for life, part of which is income and part of which is capital. If that is not producing income, I do not know what the words mean. That security, being realized, has produced income. We cannot say that this clause applies because the security did not produce income. Then does this clause mean that if the security does produce income, although it does not produce it year by year, but produces it after a delay and a lapse of time, during which there was no income made—can we say the effect of this clause is to give the income to the remainderman and take it away from the tenant for life?" And he answers that question in the negative. That is the question I have to ask myself here. The only difference between that case and the present is that there the interest was actually payable during the lifetime of the tenant for life. It was not paid because the mortgagor either could not or would not pay it. Here the reason why the interest was not paid until January 2, 1906, was because under the express covenant in the mortgage the mortgagor was only bound to pay on that day. Does that make any real difference between the two cases? In my judgment it does not. The mortgage deed here spoke of interest, and it is a well-known principle of the common law, which was affirmed by the Apportionment Act, 1870, that interest on money lent is treated as accruing due from day to day. Applying that principle to the present case, although the interest was not payable until, and could not have been sued for before, January 2, 1906, it was accruing from day to day, and then, when it was paid, the security, in respect of which it was paid, had produced income which had been accruing from January 13, 1901, to January 2, 1906, and as such the income was payable to the tenant for life.

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Solicitors: *A. E. Sydney; Harrison & Davies; Freshfields.*

W. I. C.



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[1907 M. 658.]

*Administration—Real Estate—Devise of Mortgaged Estate—Partition Action—Fund in Court representing Rents and Profits—Administration Action—Right of Creditors to attach Fund before Judgment—Administration of Estates Act, 1833 (3 & 4 Will. 4, c. 104).*

The Administration of Estates Act, 1833, which makes the real estate of a deceased person assets for the payment of his debts, whether due on simple contract or on specialty, gives no lien or charge on such real estate until a judgment has been obtained.

Testator, who died in 1876, devised and bequeathed his residuary real and personal estate to three persons in equal shares. At the time of his death he was entitled to certain real estate which he had mortgaged in 1839 to secure the repayment of a certain sum and interest. In 1902 the devisees commenced an action for sale in lieu of partition, and in that action certain sums, representing the rents and profits of the mortgaged property, had been paid into Court. In 1903 judgment in the action was given directing the usual accounts and inquiries, and ordering the property to be sold, which had not, however, yet been done. In 1907 the plaintiffs, in whom the benefit of the mortgage of 1839 was now vested, issued their writ in the present action, suing on behalf of themselves and all other creditors of the testator, against the devisees, claiming (1.) administration of the testator's real and personal estate, and (2.) that the devisees might be restrained from applying for the transfer and payment to them of the fund in Court to the credit of the partition action, and that such fund might be ordered to be transferred to the credit of the present action. No judgment had as yet been obtained in this action.

On an application by the plaintiffs for an interim order in the terms of paragraph 2 of the claim in their writ:—

*Held*, that under the Administration of Estates Act, 1833, neither the corpus nor the rents and profits of the real estate became liable to creditors until a judgment had been obtained, and that, as no judgment had been obtained in the present case, the application must be refused.

*In re Hyatt*, (1888) 38 Ch. D. 609, distinguished.

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John Moon by his will, dated February 28, 1875, devised and bequeathed his real and personal estate (subject as to his personal

estate to the payment of his debts and funeral and testamentary expenses) unto Thomas Henry Moon, William Christopher Moon, and Dorothy Ann Holmes in equal shares, and he declared that the share of Dorothy Ann Holmes should be for her own exclusive use and benefit.

The testator died on June 23, 1876, and on November 7, 1876, letters of administration to his estate with the will annexed were granted to W. C. Moon and Dorothy Ann Holmes, the executors appointed by the will having renounced probate thereof.

At the time of his death the testator was entitled to certain real estate situate at Thinford, in the county of Durham, subject to a mortgage dated May 25, 1839, and made between the testator of the one part and Ann Mary Pearson of the other part, for securing the repayment to the latter of 3450*l.* and interest. The benefit of this mortgage had been transferred to and was now vested in the plaintiffs in the present action.

After the death of the testator the administrators distributed his personal estate, but made no provision for the payment of the mortgage debt.

In 1876 T. H. Moon, in consideration of 250*l.*, conveyed his one-third share of the testator's estate to Dorothy Ann Holmes and Thomas William Turner Moon.

In August, 1897, W. C. Moon died intestate, leaving his widow, Ann Moon, and T. W. T. Moon, his only son and heir-at-law, him surviving.

By a deed dated January 9, 1903, Ann Moon in consideration of 250*l.* released her right of dower in the one-third share of W. C. Moon to her son T. W. T. Moon.

By an indenture of mortgage dated May 15, 1903, T. W. T. Moon conveyed his shares in the property to Caroline Heathcote by way of mortgage to secure the repayment of 500*l.* and interest. This mortgage was by a deed dated April 12, 1907, transferred to Rachel Margaret Nash.

In 1902 an action of *Moon v. Holmes* [1902 M. 713] was commenced in the Chancery Division by T. W. T. Moon and Ann Moon against Dorothy Ann Holmes and T. H. Moon claiming a sale of the property in lieu of partition.

On July 17, 1903, a receiver was appointed of the rents and

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profits without prejudice to the rights of the present plaintiffs as mortgagees, and he was ordered to keep down the interest on the plaintiffs' incumbrance, and the defendant Dorothy Ann Holmes was ordered to pay the sum of 459*l.* 14*s.* 3*d.* (being the admitted balance of rents and profits in her hands) into Court to the credit of the action.

On December 12, 1903, judgment in the action was given directing the usual accounts and inquiries, and ordering the property to be sold and the proceeds paid into Court.

The property had not as yet been sold.

The funds in Court to the credit of that action were as follows : cash, 1*l.* 5*s.* 6*d.* ; Consols, 107*l.* 10*s.* 6*d.* ; and money on deposit, 1009*l.* 9*s.* 5*d.*, which represented as to about 290*l.* damages paid by lessees of the property in respect of breaches of covenant under their lease, and as to the residue rents and profits of the property.

On March 9, 1907, the plaintiffs, suing on behalf of themselves and all other creditors of the testator, issued their writ in the present action against Dorothy Ann Holmes and T. W. T. Moon, claiming (1.) administration of the real and personal estate of the testator, and (2.) that the defendants might be restrained from applying for the transfer and payment to them of the funds in Court to the credit of *Moon v. Holmes*, and that such funds might be ordered to be transferred to the credit of the present action.

No judgment had as yet been obtained in the present action.

Ann Holmes had recently died.

The plaintiffs now moved for an order in the terms of paragraph 2 of their claim in the writ, or, in the alternative, that a proper person might be ordered to receive the funds or so much thereof as might by the order to be made on further consideration in the action of *Moon v. Holmes* be ordered to be paid to the defendants in this action or either of them.

The plaintiff R. H. Holmes, in his affidavit in support of the motion, alleged that the present value of the property was far less than 3450*l.*, the amount of the mortgage debt ; that he was informed that the action of *Moon v. Holmes* would shortly come on for further consideration, and that unless the parties

thereto were restrained by injunction they would procure the funds in Court to be paid and transferred to them; that the plaintiffs feared that they would be unable to recover any part of the said funds if so transferred and paid out, and that they were therefore desirous that the said funds might be preserved until their claim in the present action had been adjudicated on.

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*Rowden, K.C.*, and *Elgood*, for the plaintiffs. The question in this case is as to the right of creditors against devisees of real estate in respect of rents still in medio, where on the evidence it appears that the assets of the testator are insufficient to pay his debts, and that if the devisees obtain possession of such rents they will be lost to the creditors. Rents and profits of real estate, although not mentioned in the Administration of Estates Act, 1833, are assets by accretion liable for payment of creditors by specialty just as much as the real estate is assets under that Act: *In re Hyatt*. (1) The funds in Court are, therefore, assets for the payment of debts; and all that the plaintiffs desire is that they should be kept in medio pending judgment in the present action. If the funds were in Court in the present action the Court would not allow them to be paid out to the devisees so long as any creditor remained unpaid: *Green v. Lowes*. (2)

[WARRINGTON J. That case had nothing to do with the Act. The plaintiffs there had an actual charge on the real estate.]

It bears on the point that where, as here, there has been no judgment for administration, the Court will keep the fund in medio. It is immaterial whether or not the will contains a charge of debts.

The real estate in this case being insufficient for the payment of the testator's debts, the plaintiffs are entitled to an account of the rents and profits from the death of the testator: *In re Hyatt* (1); *Curtis v. Curtis* (3); *Schomberg v. Humfrey* (4); *Stratford v. Ritson* (5); *Davies v. Topp* (6); 2 Seton on Judgments, 6th ed. p. 1663. *In re Hyatt* (1) is not, it is submitted, overruled by the dictum of Rigby L.J. in *In re England* (7) that devisees

(1) 38 Ch. D. 609, 621.

(4) (1841) 1 D. & War. 411.

(2) (1791) 3 Bro. C. C. 217.

(5) (1846) 10 Beav. 25.

(3) (1789) 2 Bro. C. C. 620, 633.

(6) (1789) 1 Bro. C. C. 524.

(7) [1895] 2 Ch. 820, 826, 827.



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are not liable for rents received by them before the issue of the writ. If Rigby L.J. thereby intended to say that an heir or a devisee could never be liable for back rents, such a statement is contrary to the authorities. The plaintiffs, however, are not seeking on the present application to get back anything from the heir or devisee.

[WARRINGTON J. referred to *In re Illidge*. (1)]

The plaintiffs do not rely on any charge or lien on this particular property, but on the analogy of the protection accorded by the Court to creditors in the case of personal estate.

*Ashton Cross*, for the defendant Dorothy Ann Holmes, the wife of the plaintiff R. H. Holmes, took no part in the argument, but relied on that adduced on behalf of defendant T. W. T. Moon.

*H. Terrell, K.C.*, and *F. Thompson*, for the defendant T. W. T. Moon. The plaintiffs, suing on behalf of themselves and all other creditors, ask the Court to allow them to seize the assets of the testator before obtaining a judgment. There is no reported case in which the Court has allowed that to be done. A person cannot obtain the appointment of a receiver or an injunction unless he has some interest in the testator's estate, and a creditor has no such interest until he has obtained a judgment. He has only an equity and not an equitable interest. The whole of the law upon the subject is embodied in the judgment of Mellish L.J. in *British Mutual Investment Co. v. Smart* (2), who there states that there is "no actual charge until either a judgment is obtained at law or a decree is obtained in equity." The creditor's remedy against the devisee is a personal one with a particular mode of execution. The devisee is personally liable for the rents received by him, but the rents themselves are not charged, and that is what, it is submitted, Rigby L.J. meant by his dictum in *In re England*. (3)

Since the passing of the Statute of Fraudulent Devises (3 Will. & M. c. 14) there is not a single case to be found in which an injunction has been granted at the instance of a creditor before he has obtained judgment. No charge is

(1) (1884) 27 Ch. D. 478.

(2) (1875) L. R. 10 Ch. 567, 578.

(3) [1895] 2 Ch. 820, 826, 827.

constituted until judgment: *Richardson v. Horton* (1); *Morley v. WARRINGTON J.*  
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*Rowden, K.C.*, in reply. This case does not depend upon whether or not there is charge or lien upon the real estate. The Court will protect real assets against the devisee as it will protect personalty against executors: *Evans v. Brown* (3); Carson's Real Property Statutes, p. 400. *Richardson v. Horton* (1), *Morley v. Morley* (2), and *British Mutual Investment Co. v. Smart* (4) were all cases raising questions as against the alienee of the devisee of real estate. It is admitted that a bona fide alienation by the heir or devisee defeats the Act of 1833. The plaintiffs do not base their case on charge or lien, but on the fact of the fund being assets for the payment of debts. All that the plaintiffs claim is that the Act of 1833 gives them some interest in the assets.

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WARRINGTON J. The action in which the present motion is made is an action brought by specialty creditors on behalf of themselves and all other creditors for the administration of the real and personal estate of the testator. I think I am entitled to assume that at the date of the issue of the writ the personal estate of the testator had been administered. There are funds which have been paid into Court in a partition action between the devisees of the real estate, representing rents and profits derived from real estate. The object of the present motion is to attach those funds and to prevent them being paid out to the devisees of the real estate pending judgment in the present action, which has not as yet been obtained. The question, therefore, is whether under those circumstances the creditors are entitled to attach those funds and to prevent them being paid out to the devisees pending judgment in this action. That depends on what is the right of a creditor against the real estate of a testator under the Administration of Estates Act, 1833. It is well known that that statute was the concluding one of a series of statutes by which the real estate of a deceased person had been made available for the payment of his debts. This particular

(1) (1843) 7 Beav. 112, 123.

(2) (1855) 5 D. M. & G. 610, 621.

(3) (1842) 5 Beav. 114, 119.

(4) L. R. 10 Ch. 567, 578.

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statute provides that "When any person shall die seised of or entitled to any estate or interest in lands, tenements, or hereditaments, corporeal or incorporeal, or other real estate, whether freehold, customaryhold, or copyhold, which he shall not by his last will have charged with or devised subject to the payment of his debts, the same shall be assets to be administered in Courts of equity for the payment of the just debts of such person, as well debts due on simple contract as on specialty"; and then there is a provision, which I need not read, the effect of which is to place heirs and devisees in respect of debts, whether by simple contract or by specialty, in the same position as heirs under a covenant in which the heirs were bound.

I think it is clearly established by the authorities—which are summed up in *British Mutual Investment Co. v. Smart* (1)—that under that statute no actual charge on the real estate of a deceased person is given until a judgment at law (under the previous statutes) or a decree in equity has been obtained. The position of an heir or devisee with regard to real estate which he inherits or takes by devise appears, on the authorities, to be this. Under the Debts Recovery Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 47), consolidating the previous statutes, the heir or devisee is liable for specialty debts to the creditors, if the specialty binds the heir, and may be sued at law for that liability; but his liability is limited to the value of the real estate which descended or was devised to him. The land itself is not liable for debts.

The plaintiffs have very much relied on a case before Chitty J. of *In re Hyatt* (2), and on a number of old cases which that case really followed. That was a very simple case. There a testator had devised certain lands to two trustees upon certain trusts, which lands were subject to a mortgage. There was a covenant in the mortgage deed for payment of principal and interest. The estate was insolvent. The personal estate had been administered, and some of it had been paid away to creditors, and some of it to beneficiaries. After all this had been done the mortgaged estate turned out to be insufficient for the payment of the mortgage

(1) L. R. 10 Ch. 567.

(2) 38 Ch. D. 609.

debt, and the mortgagees took possession and commenced proceedings for administration under the Administration of Estates Act, 1833. In that action an account was directed against the trustees of the rents and profits of the real estate received by them. The trustees sought to discharge themselves by alleging payment made to creditors and beneficiaries. Chitty J. held that they could not so discharge themselves, but that the devisees were liable not only for the rents and profits since the judgment, but also from the death of the testator. That case was, as I have said, much relied on by the plaintiffs. If, as the plaintiffs say, they are entitled to an account of the rents and profits since the death of the testator, that is an account which would include these particular rents and profits. The devisees must account for all that they have received except what they have properly paid away. These funds in Court in the other action are something which would properly come into the account and would form part of the balance which would ultimately be found due from the devisees on taking the account. Then the plaintiffs say that, as they would get those funds, the devisees ought to be prevented from receiving them. The fallacy of that contention lies in this. It seems to me that the true result of the statute, and the authorities construing it, is that, while an heir or devisee is liable to the extent of the rents and profits which he has received, the rents and profits themselves are not liable until judgment. They are merely the measure of his liability to the creditors, whether they are corpus of real estate or whether, as Chitty J. decided in *In re Hyatt* (1), they are assets by accretion. Neither the real estate nor the rents and profits are liable to creditors until that step has been taken which renders them liable to administration, that is to say, until a judgment has been obtained.

In the present case I am dealing with a case in which no judgment in administration has been obtained, but it is sought to attach these funds in Court representing rents and profits before judgment. In my opinion you can no more attach these rents and profits before judgment in the administration action than you can attach the real estate of a living person

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WARRINGTON J. before obtaining a judgment. The motion therefore fails, and must be refused with costs.

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Solicitors: *George Reader & Co., for Hoyle, Shipley & Hoyle, Newcastle-upon-Tyne; Field, Roscoe & Co., for E. F. Pye-Smith, Salisbury; Turner & Co.*

W. I. C.

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June 5, 6.

[1906 B. 4606.]

*Trade Name—Name Descriptive of Article and Process used—Similarity of Name—Injunction—Company—Registered Name—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 20.*

In considering whether the name of a registered company so nearly resembles the name of another company previously registered "as to be calculated to deceive" within the meaning of s. 20 of the Companies Act, 1862, the principles to be applied are at any rate extremely analogous to those which are applicable in ordinary passing off cases in which the Court has to consider whether a trade name, or a trade description, or a description of a particular class of goods, or the get-up of a particular class of goods, is or is not likely to deceive.

A distinction must always be drawn between cases in which the words complained of are words of common ordinary meaning and cases in which the words complained of more or less partake of the character of "fancy" words or primarily do not relate to the article, but to the person who makes it.

The onus of proving that words which are commonly and properly used as descriptive words have such a secondary or subsidiary meaning as to entitle the person who has used them to their exclusive use lies on that person, and is not easily discharged.

In 1901 one B. obtained letters patent in respect of machinery to be used for cleaning carpets and the like by a method depending on suction (caused by a vacuum) operating through pipes the nozzles of which were moved over the articles to be cleaned. B. called his protected machinery a "vacuum cleaner" and the process a "vacuum cleaning." In 1902 B. sold his patent to a company, registered in the same year, called the "Vacuum Cleaner Company, Limited." In 1903 the patent was assigned to the plaintiff company, which was registered in that year and called the "British Vacuum Cleaner Company, Limited," and was formed to take over the undertaking of the previous company. The plaintiff company formed and was interested in several other companies, each of which had as part of its name the words "vacuum cleaner" in juxtaposition, with a licence to use B.'s invention within a defined limit

distinct from the area of the plaintiff company's operations. In 1904 one X. obtained letters patent for cleaning by suction created by a vacuum and with pipes and a nozzle, but differing in material parts from B.'s invention. In 1906 the defendant company was registered as the "New Vacuum Cleaner Company, Limited," with the view of taking, and working in a district of the metropolis, a licence to use the invention patented by X. In an action to restrain the defendant company from using the words "vacuum cleaner" in conjunction as part of its registered name or of any other name so as to lead to the defendant company being taken for the plaintiff company or being supposed by the company to be connected with it, it was proved (a) that a large proportion of the plaintiff company's customers addressed letters to them as the Vacuum Cleaner Company, with or without the word "limited"; (b) that since the registration of that company the words "vacuum cleaner" had been associated with the machine made under B.'s patent and used by that company, and that those words and the words "vacuum cleaning" had been understood by the public to be a particular kind of cleaning and a particular process, and that while the plaintiff company had a monopoly of a cleaner and a process of that sort, the public connoted the fact that the machine was the machine of the plaintiff company :—

*Held* that, the words "vacuum cleaner" being merely descriptive words, the case was within the principles laid down by Lord Davey in *Cellular Clothing Co. v. Maxton and Murray*, [1899] A. C. 326, 346; that the words had no secondary or subsidiary meaning; and that the plaintiff company was not entitled to have the defendant company restrained from using the words.

*Reddaway v. Banham*, [1896] A. C. 199, distinguished.

*Held*, also, that the plaintiff company, by allowing subsidiary companies to be formed under names containing the words "vacuum cleaner" in conjunction, had admitted that another company with a name so containing those words would not necessarily be confused with the plaintiff company.

Observations as to the weight to be attached to evidence adduced to shew the probability of deception by the use of somewhat similar names.

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LETTERS patent (No. 17433 of 1901) were granted to H. C. Booth for "Improvements relating to the extraction of dust from carpets and other materials," the extraction being effected by passing over the surface of the carpet or the like hollow implements whose interior was maintained at a pressure lower than that of the atmosphere by the action of a power-driven suction pump connected therewith by a pipe or conduit which also served to conduct the extracted impurities along with the air to a contrivance for separating and collecting them from the air, so that the latter reached the pump in a cleanly condition. The inventor

PARKER J. called his machine a "vacuum cleaner," and the process "vacuum cleaning."

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In 1902 Booth sold his patent to a company incorporated in February, 1902, under the name of the Vacuum Cleaner Company, Limited, which had only a small capital and business.

On May 11, 1903, the plaintiff company was incorporated under the name of the British Vacuum Cleaner Company, Limited, with a much larger capital, and having amongst its objects the acquisition of interests in patents relating to the use of air, and of any apparatus therefor, granting licences in respect of such patents, and carrying on business as carpet and general cleaners. This company acquired the undertaking of the Vacuum Cleaner Company and Booth's patents, whether British, Colonial or foreign, and had an extensive business. It advertised extensively, the advertisements referring prominently to the machine used by it as the "vacuum cleaner" and the process as the "vacuum cleaning process."

The plaintiff company, in 1903 and 1904, caused to be formed in England seven subsidiary companies, each having the words "vacuum cleaner" as part of its name, and in each of which the plaintiff company had a considerable shareholding, and these companies or some of them formed and were interested in eight English local subsidiary companies, each of which had the same words in its name. A number of subsidiary Colonial and foreign companies were also formed, which had the same words or their foreign equivalents as part of their names, and in which the plaintiff company or the subsidiary companies forming them had some shareholding or other interest. The areas in which the subsidiary companies could use Booth's process were limited.

In October, 1905, the defendant company was incorporated in England under the name of the New Vacuum Cleaner Company, Limited, with a small capital, and having as its object the acquisition and working of a licence to use a process of vacuum cleaning (protected by letters patent No. 11,201 of 1904, granted to John Birtwistle), which differed in material parts from Booth's process. The licence was limited to a certain district in the metropolis.

An action was brought for an injunction to restrain the

defendant company from using the name "vacuum cleaner" in conjunction, as part either of its registered or other name, in such a way as to lead to the defendant company being taken for the plaintiff company, or to lead to the public supposing that one company had any connection with the other. At the trial of the action the evidence of the plaintiff company, which is more particularly referred to in the judgment of Parker J., shewed that a large percentage of the customers of the plaintiff company wrote to it as "The Vacuum Cleaner Company"; that so long as the plaintiff company was the only company which went about with such a machine as it used there was a connotation in the mind of the public of the fact that the machine was that company's machine; that on three occasions there had been some confusion in the minds of members of the public; that one person would, in his opinion, but for his special knowledge, be deceived by the defendant company's name into thinking that it was connected with, if not the plaintiff company; that the two companies had shops two doors off in the same street, the shop of the plaintiff company being already there when the defendant company opened a branch in the same street, and that one witness supposed that they were not separate companies; and that two employees of the plaintiff company had left its service for that of the defendant company.

The action was tried on June 5 and 6, 1907.

*Buckmaster, K.C.*, and *Colefax*, for the plaintiff company. Before 1901 there existed no effectual means of cleaning carpets and the like by means of the sucking power of a vacuum. Booth in that year patented and brought out a machine and process which have turned out a great success. The plaintiff company has acquired the patent, and also Colonial and foreign patents for the same invention, and has spent large sums in advertising itself. The words "vacuum cleaner" in conjunction were deliberately adopted by the plaintiff company as the principal part of its name, and would have been the only distinguishing words of its name had it not been for some difficulty about taking the exact name of the vendor company. The defendant company has deliberately selected a name like that of the plaintiff

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If the fact of similarity of name is not sufficient of itself to entitle the plaintiff company to relief, the surrounding circumstances are sufficient to justify an injunction being granted. The plaintiff company had one of its places of business in a street in Highgate. The defendants put their name up next door but one in the same street. Some of the employees of the plaintiff company have been taken into the service of the defendant company. So much is the plaintiff company identified by the words "vacuum cleaner" that letters are frequently addressed to it in the name of "The Vacuum Cleaner Company, Limited," or "The Vacuum Cleaner Company." The inference is irresistible that the name of the defendant company so nearly resembles that of the plaintiff company that the former is calculated to deceive. The only difference between the two names is that one is called "British" and the other "New." The use of the latter word will probably make the public think that the defendant company is a mere reconstruction of the plaintiff company. [They referred also to s. 20 of the Companies Act, 1862; *North Cheshire and Manchester Brewery Co. v. Manchester Brewery Co.* (1); *Daimler Motor Co. (1904) v. London Daimler Co.* (2)]

*A. J. Walter, K.C., and J. H. Gray*, for the defendant company. In cases under s. 20 of the Companies Act, 1862—which provides that "no company shall be registered under a name identical with that by which a subsisting company is already registered, or so nearly resembling the same as to be calculated to deceive," except in the particular cases mentioned—the same principles are applicable as are applicable in cases as to passing off the goods of one manufacturer for those of another: *Aerators Ltd. v. Tollitt*. (3) In that case Farwell J. pointed out that "if the name is simply a word in ordinary use representing a machine or an article of commerce, the probability of deception is out of all proportion less than it would be in the case of an invented or fancy word, or even of the name of a place. The latter may well point to a particular company; the former certainly points

(1) [1899] A. C. 83.

(2) *The Times*, April 16, 1907.

(3) [1902] 2 Ch. 319, 324.

prima facie to the machine or article, and can only under very exceptional circumstances and by a long course of usage point to the company, rather than the thing itself." That is sufficient to distinguish the present case from *North Cheshire and Manchester Brewery Co. v. Manchester Brewery Co.* (1), where the name of a place was common to both titles. Locality is not here involved. The words "vacuum cleaner" are not fancy words, but ordinary English words descriptive generally of the machine or kind of machine which the plaintiff company uses, and not having any secondary or special meaning, denoting only the machine or process used by the plaintiff company, and, that being so, the plaintiff company is not entitled to an injunction to prevent a company which uses a vacuum cleaner from using the same words as part of its name: *Cellular Clothing Co. v. Maxton and Murray*. (2) The same case shews that the onus lies on the person alleging it to prove that words which are merely descriptive of goods have acquired a secondary meaning—viz., that they are significant of the goods being his goods as distinguished from those of other manufacturers. The plaintiff company has failed altogether to prove any such secondary meaning, and it has not proved that any confusion has resulted, or is likely to result, from the use of the name of the defendant company. [They also referred to *Rugby Portland Cement Co. v. Rugby and Newbold Portland Cement Co.* (3); *Colonial Life Assurance Co. v. Home and Colonial Assurance Co.* (4); *Fels v. Hedley & Co.* (5); *Reddaway v. Banham* (6); Kerly on Trade Marks, 2nd ed. p. 469.]

*Buckmaster, K.C.*, in reply. In *Aerators, Ld. v. Tollitt* (7) the articles sold by the two companies were quite different. The question in the present case is not whether the defendant company's machine can be called a vacuum cleaner, but whether people are induced to think, when they are sending for that company, that they are sending for the plaintiff company.

The defendant company is taking advantage of the years of

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(1) [1899] A. C. 83.

(4) (1864) 33 L. J. (Ch.) 741.

(2) [1899] A. C. 326.

(5) (1903) 20 Rep. Pat. Cas. 437.

(3) (1891) 9 Rep. Pat. Cas. 46.

(6) [1896] A. C. 199.

(7) [1902] 2 Ch. 319, 324.

PARKER J. work by which the plaintiff company has established a name by which it is known. If that is not sufficient evidence against the defendant company, there may be called in aid the fact that it has established a place of business close to one of the defendant company's branches, the fact that customers of the latter company have mistaken one company for the other, and other evidence pointing to confusion or the likelihood of confusion. [He also referred to *Accident Insurance Co. v. Accident, Disease, and General Insurance Corporation*. (1)]

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PARKER J. In the year 1901 a gentleman of the name of Booth obtained letters patent in respect of certain machinery which he intended to use for the purpose of cleaning carpets and other articles. The method of user depended upon suction caused by a vacuum, the suction operating through pipes the nozzles of which were moved over the carpets or other articles required to be cleansed, the dust collected by means of the suction being carried outside the building in which the cleansing took place into some receptacle in the machine. After consultation with his partners he determined to call his machine a "vacuum cleaner," and the process by which the articles were cleansed "vacuum cleaning."

The patent was not a master patent in the sense of covering all processes of cleaning by means of pipes operating by suction caused by a vacuum, but it really protected only a specific part of the machinery used. The name which Booth chose, however, for his machinery and for the process of cleansing by means of such machinery was not a specific name denoting in any way the essential feature of his patent, but was a generic name applicable to all processes of cleaning by means of the creation of a vacuum and of suction caused by means of such vacuum, and the inventor must have known, when he applied a generic description to his machinery and his process, that other people might devise and bring upon the market other means of vacuum cleaning not protected by his patent—in fact different species of the same genus. In the year 1902 Booth sold his patents to a company, promoted for the purpose of working them, which was

incorporated in February, 1902, under the name of the "Vacuum Cleaner Company, Limited." This company had only a small capital, and, though it started to work the patents, did not, as far as I gather, carry on a very extensive business. In May, 1903, the plaintiff company was formed under the title of the "British Vacuum Cleaner Company, Limited," with a much larger capital, and the purpose for which it was formed was to take over the undertaking of the Vacuum Cleaner Company, Limited, and to acquire all Booth's patents relating to his invention, whether British, Colonial or foreign. The plaintiff company has since been in operation, and has a considerable reputation and a large business. It has been advertised extensively, and all the advertisements that I have seen refer prominently to the machine as "the vacuum cleaner," and to the process as "the vacuum cleaning process." It was desired to incorporate the plaintiff company under the same name as its predecessor in title, namely, the Vacuum Cleaner Company, Limited; but some difficulty arose at Somerset House, and ultimately its existing name was adopted. In October, 1906, the defendant company was incorporated under the name of the "New Vacuum Cleaner Company, Limited." It has a small capital, and has only recently commenced business. Its object was, apparently, to take a licence to use a process of vacuum cleaning which was the subject of a patent taken out by one Birtwisle in 1904, and to work under that licence, which is limited to a certain district in the metropolis.

Birtwisle's process, so far as it acts by means of suction created by a vacuum, and through pipes operating by a nozzle applied to the articles to be cleansed, is the same as Booth's process; but in material parts it differs from Booth's process, and it is admitted on all sides—at any rate for the purposes of this trial—that Birtwisle's process is not an infringement in any way of the letters patent granted to Booth. Certain advantages are claimed by Birtwisle over Booth; for example, the defendant company, which is working Birtwisle's process, says—and I have no reason to doubt—that the process can be applied (without having an apparatus operating from outside the building) by means of the vacuum created by ordinary steam in ordinary house boilers, so that by arranging on every floor for

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PARKER J. wall sockets to which suction pipes can be affixed, the process can  
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This is in effect an action by the plaintiff company for an injunction to restrain the defendant company from using the words "vacuum cleaner," either as part of the name under which the defendant company has been registered, or as part of any other name which the defendant company may use, in such a way as to lead to the defendant company being taken for the plaintiff company or to lead to the public supposing that the plaintiff company has any connection at all with the defendant company.

The action is founded, to some extent at any rate, upon s. 20 of the Companies Act, 1862, the effect of which is to prohibit the registration of a company with a name identical with the name of any company already on the register, or so similar to that name as to be "calculated to deceive"; and the question I have to decide is whether the use by the defendant company of the title "New Vacuum Cleaner Company, Limited," is, having regard to there being a company on the register known as "The British Vacuum Cleaner Company, Limited," calculated to deceive. In order to find out whether a name of this sort is likely to deceive, of course it is necessary to consider all the surrounding circumstances of the case, but in so doing it is well to bear in mind the general principles of law which are applicable to the subject-matter of the dispute.

In considering the question whether a name is likely to deceive, having regard to the existence of a similar name on the Register, the first question which arises is, Are the same principles applicable as those which are applicable in ordinary cases of passing off, where the question is whether a trade name, or a trade description, or a description of a particular class of goods, or the get-up of a particular class of goods, is or is not likely to deceive? It has been contended that the principles which are applicable in the two classes of cases differ in material respects, and that I cannot take a decision on the question of simple passing off as an authority on the question whether the defendant company in this case ought to be allowed to use the name under which it has been registered. Now,

whether there be or be not any distinction between the principles which ought to govern the Court in these somewhat different matters, I think it is clear from the decision of Farwell J. in *Aerators, Ltd. v. Tollitt* (1) that the principles which govern each class of case are at any rate extremely analogous. He says: "The principles applied by the House of Lords in *Reddaway v. Banham* (2), explained as they were in *Cellular Clothing Co. v. Maxton and Murray* (3), to which I had occasion to refer in *S. Chivers & Sons v. S. Chivers & Co.* (4), apply as much to the name of a company under s. 20 as to the 'Camel's-hair Belting,' the 'Cellular Clothing,' and the name of 'Chivers' in those cases." Although of course it is possible that for certain purposes those principles may be differently applied, I think that substantially that is a correct statement of the law upon the question.

Now, with regard to questions such as arose in the three cases referred to by Farwell J., I think a distinction must always be drawn between cases in which the word in question—the word which it is proposed to restrain the defendant from using—is a word of ordinary use descriptive of an article, and cases in which the word complained of more or less partakes of the character of a "fancy" word, or primarily does not relate to the article, but to the person who makes the article.

In *Reddaway v. Banham* (2) it was decided that a person might be restrained from using a word, or a conjunction of words, descriptive of an article, if that word, or conjunction of words, had acquired among the public, or that class of the public likely to deal in the goods in question, a subsidiary or secondary meaning, denoting, or connoting not only the quality of the article, but its origin of manufacture. The fact that camel's-hair belting in that case had acquired such a subsidiary or secondary meaning was held to have been established, and an injunction was granted accordingly. One of the main items in the evidence pointing to the conclusion that was ultimately established was a certain letter which on the face of it not only shewed a dishonest intent on the part of the person who was proposing to use the

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(1) [1902] 2 Ch. 319, 324.

(3) [1899] A. C. 326.

(2) [1896] A. C. 199, 208.

(4) (1900) 17 Rep. Pat. Cas. 420.

PARKER J. expression "Camel's-hair Belting," but also contained an admission on his part that such a secondary or subsidiary meaning did exist; and therefore it became very much easier to prove the facts required to be proved in order to obtain an injunction than it would otherwise have been. In *Cellular Clothing Co. v. Maxton and Murray* (1), on the other hand, where the question was with regard to the use of "cellular" as applied to clothing, it was held that the plaintiffs had not sufficiently established that there was a secondary or subsidiary meaning denoting that cellular clothing was clothing manufactured by the plaintiffs in contradistinction to other manufacturers; and there are remarks of the Lords in that case which shew that, in their opinion, the onus of proving such a subsidiary meaning in the case of words which are commonly and properly used as descriptive words is by no means a light one.

I should like to refer to one or two passages in that case as having, in my opinion, a considerable bearing on the question which I now have to decide, and in particular to what was said by Lord Shand and is quoted by Farwell J. in *Aerators, Ltd. v. Tollitt* (2), and also to a passage in the speech of Lord Davey. Lord Shand in *Cellular Clothing Co. v. Maxton and Murray* (1), referring to *Reddaway v. Banham* (3), said (4): "Of that case I shall only say, that it no doubt shews it is possible where a descriptive name has been used to prove that so general, I should rather say so universal, has been the use of it as to give it a secondary meaning and so to confer on the person who has so used it a right to its exclusive use or, at all events, to such a use that others employing it must qualify their use by some distinguishing characteristic. But I confess I have always thought, and I still think, that it should be made almost impossible for anyone to obtain the exclusive right to the use of a word or term which is in ordinary use in our language and which is descriptive only—and, indeed, were it not for the decision in *Reddaway's Case* (3), I should say this should be made altogether impossible." That I quote as illustrating what, at any rate in the opinion of Lord Shand, was the amount of

(1) [1899] A. C. 326.

(2) [1902] 2 Ch. 319, 324.

(3) [1896] A. C. 199, 208.

(4) [1899] A. C. 340.

the onus which rested on the plaintiff in the case of a word which, *prima facie*, had a descriptive signification. PARKER J.

The passages in the speech of Lord Davey in *Cellular Clothing Co. v. Maxton and Murray* (1) to which I desire to refer are as follows: "There are two observations which must be made: one is that a man who takes upon himself to prove that words, which are merely descriptive or expressive of the quality of the goods, have acquired the secondary sense to which I have referred, assumes a much greater burden—and, indeed, a burden which it is not impossible, but at the same time extremely difficult, to discharge—a much greater burden than that of a man who undertakes to prove the same thing of a word not significant and not descriptive, but what has been compendiously called a 'fancy' word. The other observation which occurs to me is this: that where a man produces or invents, if you please, a new article and attaches a descriptive name to it—a name which, as the article has not been produced before, has, of course, not been used in connection with the article—and secures for himself either the legal monopoly or a monopoly in fact of the sale of that article for a certain time, the evidence of persons who come forward and say that the name in question suggests to their minds and is associated by them with the plaintiff's goods alone is of a very slender character, for the simple reason that the plaintiff was the only maker of the goods during the time that his monopoly lasted, and therefore there was nothing to compare with it, and anybody who wanted the goods had no shop to go to, or no merchant or manufacturer to resort to except the plaintiff. And on this point I adopt what was said in felicitous language by Fry J. in *Siebert v. Findlater*. (2) That is, my Lords, a matter of express decision in the case of a patent. If a man invents a new article and protects it by a patent, then during the term of the patent he has, of course, a legal monopoly; but when the patent expires all the world may make the article, and if they may make the article they may say that they are making the article, and for that purpose use the name which the patentee has attached to it during the time when he had the legal monopoly of the

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(1) [1899] A. C. 343.

(2) (1878) 7 Ch. D. 801, 813.

PARKER J. manufacture. But the same thing in principle must apply where
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a man has not taken out a patent, as in the present case, but has a virtual monopoly because other manufacturers, although they are entitled to do so, have not in fact commenced to make the article. He brings the article before the world, he gives it a name descriptive of the article : all the world may make the article, and all the world may tell the public what article it is they make, and for that purpose they may *prima facie* use the name by which the article is known on the market."

Mutatis mutandis, I think that what is said in the last passage I have read applies to this particular case, in which the patentee has given a name to his article and a name to the process by which that article is used, and those names are descriptive, and descriptive generically and not specifically, and some one has subsequently devised a new process which, in ordinary language, would form a species of the same genus. Bearing, therefore, this passage in mind, I will now proceed to consider whether there is anything in the name "New Vacuum Cleaner Company, Limited," which, having regard to what the plaintiff company has proved in this case, and the existence on the Register of the name "British Vacuum Cleaner Company, Limited," is calculated to deceive.

It has been proved by the plaintiff company that a good many of its customers—possibly as many as 90 per cent. of them—more particularly lady customers, are in the habit of writing to the plaintiff company, not as "The British Vacuum Cleaner Company, Limited," but as "The Vacuum Cleaner Company, Limited," or "The Vacuum Cleaner Company" simply, without the "Limited." It is also proved that since the registration of the plaintiff company, and possibly before, the words "vacuum cleaner" were associated with the machine made under Booth's patent, being the machine which the plaintiff company works, going from house to house and removing the dust from the furniture. But it remains to be considered whether, in the mind of the public, the expression "vacuum cleaner" or "vacuum cleaning process" had acquired such a subsidiary or secondary meaning as is mentioned in *Reddaway v. Banham*.(1)

(1) [1896] A. C. 199, 208.

I think that the evidence itself—what there is of it—really points to the fact that the public have understood “vacuum cleaner” and the “vacuum cleaning process” to be a description of a particular kind of cleaner and a particular process, a cleaner, namely, which operates by means of a nozzle applied to the furniture and the suction in the pipes caused by the vacuum created by the machine. As long as the plaintiff company was the only manufacturer who manufactured and dealt with and went from house to house with a machine of that sort, no doubt in the mind of the public there would be a connotation of the fact that the machine was the machine of the plaintiff company. But I do not think that primarily the words have ever been in the mind of the public anything else than descriptive words, and, if that be so, then it appears to me that the case falls for this purpose within what was said by Lord Davey, namely, that no great inference can be drawn from the fact that during the period when the patentee has had a monopoly, or the manufacturer has had a monopoly, either at law or in fact, words primarily descriptive of an article have become associated with the patentee or manufacturer. There is nothing, and there was nothing, as he said, for the public to contrast it with, so that it is impossible to say that the public understood by those words a machine dealt in or brought round by any one person or company as distinguished from any other person or company.

Therefore I do not think that I am prepared to hold on the evidence in this case that there is any secondary or subsidiary meaning in connection with the words used by the plaintiff company such as there was proved to be in the case of the word used in *Reddaway v. Banham*. (1)

A further examination of the evidence for the plaintiff company shews that there was some confusion in the minds of certain members of the public on three occasions. In one case a request was received from Harrods, Limited, for payment of a debt which was due, not from the plaintiff company, but from the defendant company, and on two occasions telephonic messages were received by the plaintiff company, or their officers, pointing to the fact that the persons who were in

(1) [1896] A. C. 199, 208.

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PARKER J. communication with them through the telephone were under the impression that they were communicating with a company which was, or was connected with, the defendant company. I cannot however, attach much importance to these isolated instances of confusion. Another witness^{*} said that but for his own special knowledge on the point he would, he thought, be deceived by the name into thinking that the defendant company and the plaintiff company were in some way connected if not the same company. He also said that if any member of the public asked him to get his rooms cleaned by the new vacuum cleaner he should assume that he meant the cleaner of the plaintiff company, and not that of the defendant company. Of course one cannot lay very great stress upon the evidence of a single witness as regards the probability of deception, and I do not think that even a multiplication of witnesses in that respect would be of any very great importance, because it is a matter on which the judge who has to decide the case must bring his own mind to bear, and which he must decide for himself. Further, Lord Davey, in *Cellular Clothing Co. v. Maxton and Murray* (1), intimated that the evidence of persons who came forward and said that they would be deceived was worth very little in cases where the plaintiff had had, in fact or in law, a monopoly of the sale of or of dealing in the goods in question, and that such evidence only became really important when the public might possibly consider the words as descriptive of the goods of one manufacturer rather than another, there being two manufacturers whom they might compare in that respect. There was yet another witness to whose evidence I attach equally little importance. He said that having seen on two shops, two doors off each other in the same street, the names of the British Vacuum Cleaner Company, Limited, and the New Vacuum Cleaner Company, Limited, he supposed that the two names did not denote separate companies, but that one of the shops was merely an enlargement of the plaintiff company's premises. I can only say that I think the normal man seeing the two different names in the same street over different shops would draw an opposite conclusion, and would think that the two companies were rival

(1) [1899] A. C. 326, 343.

companies. But at any rate, if there are people who might be deceived in the way suggested, that is the only instance which is given. I should have thought it far more likely that the way in which deception would take place would be that people casually passing the windows might catch sight of two words, namely "Vacuum Cleaner," and might enter one shop instead of another; but with regard to deception of that sort there is no evidence, and I do not think that even that sort of deception would be at all a necessary consequence of the use of the two names.

Finally, it was urged on behalf of the plaintiff company that the evidence of deception which I have given in some detail, is greatly strengthened by the fact—which they suggest that they have also shewn—that there was on the part of the defendant company, in the adoption of its name, a fraudulent intent, or an intent which, if not fraudulent, was at any rate contrary to any fair dealings between the parties—or, in other words, that the name of the defendant company was adopted with the distinct intention of depriving the plaintiff company of benefits which it would otherwise enjoy, and in the enjoyment of which it ought to be protected. Now the evidence for that proposition is this. It appears that two servants or employees of the plaintiff company shortly after the incorporation of the defendant company deserted the plaintiff company and attached themselves to the defendant company, and that the defendant company is giving them not only the wages they received from the plaintiff company, but a commission besides. There is no evidence that any attempt was made unfairly to induce the servants of the plaintiff company to desert, as it were, and throw in their lot with the defendant company. There is no evidence of any request having been made by the defendant company to any of the servants of the plaintiff company with a view of inducing such servants to join the defendant company either by offering better terms if they joined the defendant company or in any other way, but it appears that these two employees themselves came to the defendant company and asked for employment. There was no secrecy about the matter, and when they gave notice to terminate their agreement with the plaintiff company

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PARKER J. they explained exactly to the manager of the plaintiff company what they were doing. Of course, it is well known that you cannot prevent the servants of one company going over to and becoming the servants of another company which carries on a rival business, and that is, from the point of view of the law, perfectly fair. Neither is there anything to prevent one company from employing persons who have hitherto been employed by another company merely because they are rivals in trade: that again, from the point of view of the law, is perfectly fair. It further appears that the defendant company has opened a branch office in a street in Highgate, in which the plaintiff company had already an office and only two doors off that office. There is nothing wrong in a rival company setting up in the same street and setting up two doors off. It may not be a very tactful thing to do and possibly it may not be up to the standard of the highest trade ideals, but at the same time it is perfectly legal, and there is nothing which can be objected to in that course having been pursued.

But, it is said that, taking these two things (the employment of servants and the taking of the offices) together with the adoption of the trading name, New Vacuum Cleaner Company, Limited, there was, or that I ought to infer, an intention of the defendant company to do what ought not to be done and take an unfair advantage, by the use of this name, of the trade which has been got together at considerable expense and which really belongs to a rival trader.

Now here again I think that the principles which are laid down in the reported cases have some application. I do not consider myself that if a company chooses to incorporate into its own name words descriptive of the article in which it deals it can fairly claim a monopoly of the use of those words in trade names. It seems to me that it runs the risk of having the articles similarly described in the trade names of rival traders. If any such monopoly can be gained by such means it appears to me that, from the point of view of the public, the sooner the provisions of the Companies Act in that respect are altered, the better. But I think it is precisely because a company cannot secure any such monopoly by such registration that it may register

such a name. For instance, if the inventor of a smokeless powder registered himself as "The Smokeless Powder Company, Limited," it seems to me that he could not fairly object to somebody who subsequently invented a new smokeless powder on a different principle registering himself under a title which also involved the description of the article, namely, smokeless powder. In the same way, in this case it appears to me that there is nothing in principle to prevent the defendant company from using the words "vacuum cleaner" as part of its name. Having a new species of vacuum cleaner which it proposes to bring before the public, it desires, in order to bring itself before the public as dealing with that article, to use a name involving a description of that article distinguishing it from all other articles of the same genus by using the term "new."

It seems to me that the intention and desire of the defendant company to adopt the words "vacuum cleaner" are amply accounted for by the fact that the words are descriptive and that it is an advantage to a trader to shew in his trade name the nature of the article in which he deals; and, therefore, I cannot draw any inference against the bona fides of the defendant company from the fact of its having used the words "vacuum cleaner." I agree that in using the words "vacuum cleaner" the defendant company ought to distinguish their cleaner from other cleaners on the market, but it seems to me to have been a reasonable supposition on the part of the person who is responsible for the choice of the defendant company's name that, inasmuch as the object was to distinguish what was new from what had been on the market for several years, it would be enough to call their cleaner the "new vacuum cleaner."

I have come to the conclusion, therefore, that the evidence is not sufficient to enable me to say that there was any scheme or design to take an unfair advantage of the plaintiff company by the use of the name of the defendant company; and I am therefore thrown back upon the question of fact whether, in my judgment, having regard to the circumstances and the evidence, the name is or is not likely to deceive. I have come

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PARKER J. to the conclusion that it is not, and I think that members of the public, when they allude to vacuum cleaners and vacuum cleaning, *prima facie* mean cleaners and cleaning of a particular sort and not of a particular manufacturer, and, that being the case, that when a new vacuum cleaner or a new vacuum cleaning company is brought to their notice, the inference they would be likely to draw would be, not that the cleaner and the company were the same as, but that they were different from, the cleaner and the company which they had already heard of. Therefore it seems to me that there is no reason to suppose that deception will occur.

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Finally, I should like to make some observations with reference to the subsidiary companies. The policy of the plaintiff company and its predecessor has been to create subsidiary companies to work Booth's patents within definite areas, and many of those companies have been created in which the plaintiff company is now largely interested. The subsidiary companies so created have created local companies to work the patents in more limited areas, and are largely interested in those local companies. Each of the subsidiary and local companies has been incorporated under a name involving the use of the words "vacuum cleaner," and, although their licences with regard to Booth's patents are limited to particular areas defined by the licences, there is no other reason, as far as the evidence shews, why they should not compete with the plaintiff company. The plaintiff company has, I think, by allowing the registration of those companies without objection, admitted the fact that another company whose name involves the words "vacuum cleaner" in conjunction will not necessarily be confused in any way with the plaintiff company. The allowance of such registration also points to the fact that in the opinion of the plaintiff company the words "vacuum cleaner" are not associated with a particular company, but with a particular class of machine and a particular process of cleaning. That being so, it is difficult to see, even apart from the conclusion to which I have come, how a company which has allowed these registrations in so many instances can now be heard to say that deception must necessarily occur because in a particular case the words

“vacuum cleaner” are part of the name of a company other than the plaintiff company.

I have come to the conclusion, therefore, that the action fails and must be dismissed with costs.

Solicitors for plaintiff company: *Hasties.*

Solicitors for defendant company: *John B. & F. Purchase.*

F. E.

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In re BOSWELL.

MERRITT *v.* BOSWELL.

[1904 B. 3290.]

C. A.
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July 29.

Limitations, Statute of—Part Payment—Solicitor’s Bill—Recovery of Moneys due to Client—Retainer on Account with assent of Client.

THIS was an appeal from the decision of Kekewich J. (1)

On the case being called, counsel informed the Court that a settlement had been arrived at under which the appeal was to be dismissed without costs.

Christopher James, for the appellant.

J. F. W. Galbraith, for the respondent.

Solicitors: *Whites & Co., for M. S. Emerson, Norwich; C. G. Scott.*

(1) [1906] 2 Ch. 359.

W. C. D.

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WHITMORE-SEARLE v. WHITMORE-SEARLE.

[1906 W. 3572.]

Estate Tail—Disentailing Assurance—Execution by Tenant in Tail—Death of Tenant in Tail—Subsequent Execution by Protector signifying his Consent—Inrolment—Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74), ss. 15, 40, 42.

A tenant in tail executed a disentailing assurance and died. The protector of the settlement subsequently signified his consent by executing the assurance, and the same was then duly inrolled within six months from the execution thereof by the tenant in tail :—

Held, that the consent of the protector was effectively given notwithstanding the previous execution of the assurance by, and the death of, the tenant in tail, and that the inrolment after the tenant in tail's death was good.

In re Piers' Estate, (1863) 14 Ir. Ch. Rep. 452, adopted.

ACTION.

Before the date of the execution of the disentailing assurance hereinafter mentioned certain freehold hereditaments in the county of Kent and certain capital moneys stood limited, by virtue of the settlement created by the will dated May 20, 1878, of William Searle, deceased, to the use of the plaintiff James Whitmore-Searle, during his life, with remainder to trustees during his life to preserve contingent remainders, with remainder after the plaintiff's decease to the use of the first and every other son successively of the plaintiff in remainder one after another and the heirs of the body of each such son, every elder son and the heirs of his body taking before every other son and the heirs of his body, with remainder to the use of the daughter of the plaintiff and the heirs of her body, with divers remainders over.

At that date the plaintiff had three children living, namely, an eldest son, William Whitmore-Searle, born on January 4, 1885, and the infant defendants, Bertram Whitmore-Searle, born on January 26, 1892, and Dorothy Whitmore-Searle, born on July 13, 1886.

Shortly after attaining twenty-one years of age in January,

1906, William Whitmore-Searle proposed, with the consent of the plaintiff, as the protector of the settlement, to execute a disentailing assurance of the property comprised in the settlement, and with that object a draft of an assurance for that purpose was prepared with the knowledge and consent of the plaintiff, and the engrossment was sent out to William Whitmore-Searle for execution in India, where he was then resident.

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The deed was expressed to be made between William Whitmore-Searle of the first part, the plaintiff of the second part, and A. C. Langham of the third part, and thereby William Whitmore-Searle, with the consent (thereby testified) of the plaintiff as protector of the settlement, granted to A. C. Langham and his heirs the hereditaments and capital moneys in question, to hold the same unto A. C. Langham and his heirs subject and without prejudice to the estate of the plaintiff, and to the powers annexed thereto or overreaching the estate in tail of William Whitmore-Searle, but discharged from all estates in tail of the said William Whitmore-Searle at law or in equity, and all estates, rights, interests, and powers, to take effect after the determination of or in defeasance of such estates in tail, to the use of the said William Whitmore-Searle, his heirs and assigns for ever.

The date was inserted and the deed executed by William Whitmore-Searle on October 25, 1906, at Madras, and on the same day the deed was returned by post and was received by the plaintiff's solicitors on November 10, 1906. In the meantime, namely, on November 3, 1906, William Whitmore-Searle died a bachelor and intestate, leaving the plaintiff his heir-at-law and sole next of kin.

On November 19, 1906, the plaintiff, for the purpose of testifying his consent to the disposition thereby made, executed the disentailing assurance, which was also executed by A. C. Langham and duly inrolled on November 21, 1906.

Letters of administration of the son's estate were granted on December 5, 1906, to the plaintiff, who subsequently commenced this action against his infant son and daughter, and the settlement trustees, for a declaration that the disentailing assurance

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effectually barred the entail and converted the reversionary estate tail in the freehold hereditaments into a fee simple absolute, and the reversionary quasi estate tail in the capital moneys into an absolute interest in reversion.

Stewart-Smith, K.C., and R. M. Pattisson, for the plaintiff. The first question is whether the consent of the protector of the settlement can be given after the death of the tenant in tail. The material section on this question is s. 42 of the Fines and Recoveries Act, 1833. (1) Under that section the consent of the protector must be given either by the same assurance by which the disposition is effected, or by a distinct deed. There were various modes of assurance available at the time when the Act was passed, and the alternative given by the section may be explained in this way—that where the document was only a record of the assurance, then a distinct deed was required. The present deed is an assurance and comes under the earlier part of the section. According to Kay L.J.’s definition in *In re Ray* (2), “an ‘assurance’ is in reality something which operates as a transfer of property,” and that bears out the contention that this deed is an “assurance by which the disposition is effected.” It is a disposition of the property to the tenant in tail in remainder, giving him a fee simple.

There is nothing in the statute making it obligatory that the consent of the protector shall be given in the lifetime of the tenant in tail. The plaintiff is not a conveying but a consenting party, and, so far as the protector is concerned, the assurance is only evidence of the consent. It cannot matter whether or not the conveying party is alive when the consent is given. Without the protector’s consent the assurance would be effectual to create a base fee. His consent only enlarges the estate. In s. 46, when the Act intends that two events shall be coincident, it expressly provides for it.

(1) The Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74), s. 42, provides as follows:—“The consent of the protector of a settlement to the disposition under this Act of a tenant in tail shall be given either by the same assurance by which the dis-

position shall be effected, or by a deed distinct from the assurance, and to be executed either on or at any time before the day on which the assurance shall be made, otherwise the consent shall be void.”

(2) [1896] 1 Ch. 468, 476.

The next question is whether the inrolment can take place after the death of the tenant in tail. It has been held, under 27 Hen. 8, c. 16, that a bargain and sale could be acknowledged and inrolled after the death of the grantee: *Duke of Marlborough v. Lord Godolphin*. (1) It has also been held, under the corresponding section of the Irish Act (4 & 5 Will. 4, c. 92), that a disentailing deed is valid if inrolled within six months, although after the death of the tenant in tail who executed the deed: *In re Piers' Estate*. (2) There is no more reason why the words "if the tenant in tail shall so long live" should be interpolated in this case than there was in that.

Waggett, for the infant defendant. I do not dispute that notwithstanding the death of the tenant in tail the inrolment can be properly made within the six months. The real question is the construction of s. 42. The disposition made by the tenant in tail has to be made or evidenced by deed (s. 40), and it is the assurance by which the disposition is effected which has to be inrolled within six months (s. 41); and I submit that, in the present case, "assurance" means a completely delivered deed, the complete evidence of the transfer, executed so as to satisfy the requirements of s. 34. If the consent is given by a deed distinct from the assurance, then that deed must be executed on or before the day on which the assurance is made. It seems that the policy of the Act was that there should be no interval of time between the consent of the protector and the execution by the tenant in tail for the latter to alter his mind. The protector cannot revoke his consent (s. 44). If the distinct deed must be executed not later than the assurance, there is no reason why the consent of the protector may be given after the execution of the assurance where there is only a single deed. I submit that the section must be construed strictly.

KEKEWICH J. The short question is whether a disentailing assurance, otherwise effective, is rendered ineffective by the fact that the protector of the settlement signified his consent by executing the assurance after the execution of that assurance by, and the death of, the tenant in tail.

(1) (1750) 2 Ves. Sen. 61, 79.

(2) 14 Ir. Ch. Rep. 452.

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KEKEWICH J. There is a further question whether it is rendered ineffective by enrolment after the death of the tenant in tail. This latter question I regard as settled by the Irish case of *In re Piers' Estate* (1), which has been cited, and even if I ought not to treat that as a binding authority upon me, of course it is entitled to the very greatest respect, and the language of the judgments of the Lord Chancellor and the Lord Justice of Appeal is, I think, convincing.

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So that there really is only one question to decide. Of course, it was necessary to refer to many sections of the statute; but to my mind the section that really determines the question is the 15th. But before going to that, it will be useful to inquire what the Act is. What is familiarly known as "The Fines and Recoveries Act" is stated in the title of the Act itself to be: "An Act for the Abolition of Fines and Recoveries, and for the Substitution of more Simple Modes of Assurance." A recovery was a proceeding at law fenced about by many provisions and effected in a peculiar manner, and was certainly not a simple mode of assurance. The object of the Act was to substitute for that complicated process a more simple mode of assurance. Reading s. 15 from that point of view I find greater force in the language than I otherwise should. Sect. 15 enables a tenant in tail, whether in possession or otherwise, to dispose of, for an estate in fee simple absolute or for any less estate, the lands entailed, as against all persons claiming the lands entitled by force of any estate tail, and so on. The object is to enable him to acquire, if he so desires, the fee simple absolute. He may do that according to s. 40 "by some one of the assurances (not being a will) by which such tenant in tail could have made the disposition if his estate were an estate at law in fee simple absolute." Reading the two sections together I have an enactment that the tenant in tail, instead of having recourse to the complicated process of a recovery, may convey his estate tail by any assurance by which an estate in fee simple can be assured. It is immaterial to inquire what that meant at the date of this Act, for within a few years the ordinary grant was substituted for nearly every other mode of assurance, and by a

simple grant the owner of an estate in fee has been enabled to convey and can now convey that estate.

The Act, therefore, enables a tenant in tail to bar the estate tail and acquire the fee, that is to say, to dispose of the entailed estate so as to acquire the fee simple absolute by a simple deed of grant such as would have been used for the purpose of conveying a fee simple absolute if vested in him. That is the provision of the Act. All else is in the way of proviso or enactment of precautions intended to provide against injustice to others, and against the want of a proper record, which was not wanted before the statute, because a recovery was a legal process.

There are two things required to be done. First, the deed has to be inrolled. That has been done and done effectively, because, as I have already said, the fact that it was inrolled after the death of the tenant in tail is immaterial. There is a second provision, not always essential, but essential in this case, where there was a person filling the character of protector of the settlement. The Act requires that that protector of the settlement shall consent to the disposition. The provision in the statute on that point is to be found in s. 34: "In every such case"—that is, where there is a protector—"the consent of such protector shall be requisite to enable such actual tenant in tail to dispose of the lands entailed." He must consent. Provided he consents, why should that consent not be given after the date of the execution? All that the statute requires is that the tenant in tail shall execute a certain assurance, and that that assurance shall be inrolled within a certain time. That is the act of the tenant in tail to which the protector is to consent. Can it matter that he signifies his consent at a date later than the execution by the tenant in tail? A deed may be executed by several persons at different times, and the date of the execution—the date which is to be attributed to the deed—is in some cases a matter of some importance. If there is nothing to contradict it, the date inserted in the deed is taken to be the date of actual execution, but it is common knowledge that a deed cannot always be executed, and very seldom is executed, by several parties at the same time. What I have to regard here, it seems to me, is the execution by the tenant in tail. When once there is a proper assurance

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KEKEWICH executed by the tenant in tail the six months must run from that time. That is no bar to the protector giving his consent at a later date, provided, of course, he gives it before the six months have expired, or before enrolment if effected within the six months. There is nothing in the Act which obliges me to say, or suggests that I should say, that there ought to be read into the provision about his consent the words, "provided the tenant in tail be alive." The learned judges in the Irish case could not see the necessity for such words as regards the enrolment, and I fail to see the necessity of them as regards the consent.

But a difficulty arises on s. 42. The Legislature has contemplated the convenience of the protector expressing his consent by a separate instrument, and one can easily see that that was a proper foresight on the part of the Legislature. The parties might not be residing in such places that it would be convenient for them both to execute the instrument at the same time. Therefore s. 42 provides that the consent "shall be given either by the same assurance by which the disposition shall be effected, or by a deed distinct from the assurance." If the protector gives the consent by the same assurance by which the disposition is effected all he has to do is to execute the deed to signify his consent. If he does it by a separate instrument the consent must be clearly signified on the face of that deed, and in that case it is provided that the separate deed shall be "executed either on or at any time before the day on which the assurance shall be made." The Legislature has thought fit to provide that where there is a separate deed it shall be not less than contemporaneous with the assurance by which the disposition is effected. It has said nothing about the execution of, and the date of the protector's consent to, the disentailing assurance—nothing about the case, that is to say, in which the same deed operates as an assurance and also operates as signifying the consent, and I see no reason for holding that the proviso which has been attached to the execution of the separate deed shall in any way apply to the execution of the assurance itself. That does not carry me all the way. It carries me to this, that the execution of the disentailing assurance by the protector may

be subsequent to the execution by the tenant in tail ; but there is left open the question whether the consent may be given after the tenant in tail is dead. Again I use the argument which was accepted by the learned judges in the Irish case. Where are the words to say, “ provided the tenant in tail shall so long live ” ? If the concurrence of the protector of the settlement were to pass any estate another question would arise altogether, but he is not an assuring party. The assurance is that of the tenant in tail. The protector simply gives his consent to the assurance which, under the earlier sections, would be complete without it, but which, under s. 34, is not complete without that consent. I see no reason why that consent should not be given, notwithstanding that the tenant in tail is dead. I rest my judgment mainly on this, that what the Act contemplates is an assurance by the tenant in tail, fenced about by divers provisions, which the Legislature thought fit to insert, and even though they are matters of substance and not matters of form, still I come back to this, that the assurance is by the tenant in tail. When once he has executed it it is unimportant whether all else is done or not done during his life.

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On these grounds I think the plaintiff is entitled to the declaration which he asks.

Solicitors : *Langhams ; Edmonds & Rutherford.*

R. M.

KEKEWICH J. *In re* LORD LECONFIELD'S SETTLED ESTATES.

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[1907 L. 96.]

May 28, 29. *Settled Land—Tenant for Life and Remainderman—Capital Money—Improvements—Drainage—New System—Engine-house—Settled Land Act, 1882* (45 & 46 Vict. c. 38), s. 25, sub-s. (xii.).

A tenant for life of settled estates constructed an entirely new system of drainage at the principal mansion-house, which involved the structural alteration of rooms and connection of closets with the outer air. He also erected an engine-house for the purpose of housing the engines required to supply the mansion-house with electric light. Upon the tenant for life applying to be recouped out of capital moneys his expenditure in respect of these "improvements," as coming within s. 25 of the Settled Land Act, 1882:—

Held, that all expenditure substantially for the purpose of making one complete system of drainage, beginning at one end and going to the other, would be allowed out of capital moneys.

But *held*, that the expenditure upon the erection of the engine-house could not be allowed, as it would not "increase the value of the settled land for agricultural purposes or as woodland or otherwise," within the meaning of s. 25, sub-s. (xii.), of the Settled Land Act, 1882.

The words "or otherwise" in the sub-section must be limited to purposes ejusdem generis.

ADJOURNED SUMMONS.

On January 8, 1907, a summons was taken out on behalf of Lord Leconfield, the tenant for life in possession of the Petworth and other settled estates, asking that the trustees of the settled estates might be directed to apply certain capital moneys in their hands in recouping to the applicant (1.) the sum of 4891*l.* 19*s.* 7*d.* expended by him in the construction of a new system of drainage at Petworth House, in the county of Sussex (being the principal mansion-house of the estates); and (2.) the sum of 3299*l.* 9*s.* 10*d.* expended by the applicant in the construction of an engine-house at Petworth House for the engines used for the electric lighting of the said mansion-house.

The respondents were the Honourable Reginald Wyndham, the tenant for life in remainder of the settled estates, and Colonel Charles John Wyndham, Vincent Wodehouse Yorke, and William

Mure, who were the present trustees of the settlement of the Leconfield family estates, dated December 7, 1897. The tenant for life had recently constructed an entirely new system of drainage at Petworth House, Sussex, owing to the defective nature of the old system, and he had also installed a system of electric lighting at a very large expense. No scheme had been submitted to the trustees prior to the execution of the works.

In regard to the expenditure under the head of drainage, a number of items in respect of new bathrooms, lavatories, heating, and certain ornamental work were struck out, but the tenant for life claimed to be allowed (*inter alia*) as part of the new drainage system, "the structural alterations and additions necessary in converting rooms into water-closets and sink rooms, including partitions, doors, windows, and making good walls," and he also asked for the expenditure in connection with the hot and cold water supply.

With regard to the item for the engine-house, it appeared that an old brew-house in the vicinity of Petworth House had been converted into an engine-house for the purpose of the engines used in connection with the electric lighting of the house. A steel floor had been put in to carry the weight of the engines, and a cavity under the floor had been filled in with concrete.

P. O. Lawrence, K.C., and *Austen-Cartmell*, for the tenant for life. On the question of drainage we claim (*inter alia*) the expenditure for structural alterations in moving the water-closets from the inside of the house to the outer walls, and also for the hot and cold water supply and the drainage and waste-water pipes. We further claim the sum of 3299*l.* 9*s.* 10*d.* for the engine-house under s. 25, sub-s. (xii.) (1), of the Settled Land Act, 1882. We cannot claim the electric light installation, but only the engine-house. In the case of *In re Blagrove's Settled Estates* (2) it would seem that an engine-house for electric lighting apparatus,

(1) Sect. 25 describes the improvement authorized by the Act "for the benefit of settled land."

Sub-s. (xii.): "Saw-mills, scutch-mills, and other mills, water-wheels,

engine-houses, and kilns, which will increase the value of the settled land for agricultural purposes or as woodland or otherwise."

(2) [1903] 1 Ch. 560.

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erected at some little distance from the mansion-house, would not be an addition or alteration within the meaning of s. 13 of the Act of 1890, but the expense of the engine-house itself was allowed by Joyce J. That decision, however, referred to "additions" or "alterations" reasonably necessary or proper to enable the buildings to be let, and does not apply to the present case. I ask for the engine-house here on the ground that it is a distinct improvement, and will be for the benefit of the settled land within the meaning of s. 25 of the Act of 1882. The "settled land" also includes the mansion-house, of which it forms a part, and this engine-house will "increase the value of the settled land" within sub-s. (xii.). Even if it does not strictly come within the words "for agricultural purposes or as woodland," it is covered by the very general words which follow, "or otherwise," which should be construed literally. There is no reason to confine the word "engine-house" to a specified class of engine-houses for one particular purpose. This one is wanted, no doubt, for the supply of electricity to the mansion-house, but it is merely the building itself for which the capital money is asked, quite apart from the engine or machinery for the electric supply. It would be putting too narrow a construction upon sub-s. (xii.) to exclude this engine-house.

Dighton Pollock, for the trustees of the settled estates and the remainderman. On the question of drainage, I submit that nothing in the nature of structural alterations or additions to the house ought to be included. In *In re Tucker's Settled Estates* (1), which was a case under s. 15 of the Act of 1890, it was decided that the costs of mere repairs or works incidental to the ordinary use, occupation, and enjoyment of the property ought not to be allowed out of capital moneys: "The cost of additions to and alterations in the drainage and sanitary arrangements of a mansion-house held to fall within this principle."

[KEKEWICH J. referred to the conclusion of Lopes L.J.'s judgment (1).]

Putting in a new system of water-closet is an ordinary incident, and not such a permanent improvement as would benefit the remainderman. It is no part of the system of drainage to alter

walls and rooms. On the question of the expenditure for the engine-house, I submit that the word "engine-house" must, under sub-s. (xii.) of s. 25, mean an engine-house to improve the land in a certain way as therein pointed out, such as for agricultural purposes, saw-mills, &c. The words "or otherwise" must be taken to mean for purposes ejusdem generis, that is, for agricultural purposes. It is to improve the settled land as land. The other words in the section, mills, water-wheels, kilns, &c., indicate the objects which the Legislature had in view, and do not apply to the mansion-house at all, but to the land and to the increase of the value of the land for agricultural purposes. There is no evidence that this would be a permanent improvement of the estate. Further, this engine-house cannot be sanctioned in connection with the electric light installation, which, according to *In re Clarke's Settlement* (1) and *In re Blgrave's Settled Estates* (2), could not be sanctioned as an addition to a building under s. 13 of the Act of 1890. Unless the engine-house can be sanctioned under sub-s. (xii.) it cannot be sanctioned at all, as it has been constructed solely for the purpose of housing the engines for the electric lighting.

P. O. Lawrence, K.C., in reply. There is conclusive evidence that this engine-house would increase the value of the mansion-house, and that has been assumed; the only point is whether it comes within the Act.

KEKEWICH J. The tenant for life of a settled estate seeks to be recouped out of capital money his expenditure in building an engine-house, which is one of the objects specified in s. 25 of the Act of 1882, sub-s. (xii.). What he has done is to erect an engine-house, which I assume to be well erected in a proper way in order to contain the engines to be used for supplying the principal mansion-house with electric light. Is he entitled to that? There certainly is an apparent difficulty in his way in this—that he can only claim the expenditure on the home of the engine, but not on the engine itself, or on any machinery connected therewith. That strikes one as strange, but if that is the meaning of the section, then, of course, one has nothing to do

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(2) [1903] 1 Ch. 560.

KEKEWICH but to adopt it. Still, that is not a point to be altogether lost sight of.

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Now there are some other things in this sub-section which are specified. I leave them out for the present, and read the sub-section as if they were not there—"engine-houses, which will increase the value of the settled land for agricultural purposes or as woodland or otherwise." The objection is taken that this engine-house would not increase the value of the settled land. I am told there is evidence conclusive on that point which I have not heard, but which I will assume, for the present purposes of the case, shews that the engine-house per se, standing alone without any contents whatever, would now or at some future time, increase the value of the settled land. It is rather a large assumption, but I will assume that the evidence goes so far. The next question that occurs to me is, What is meant by "increase the value of the settled land"? Does it mean increase the value for sale, or for letting, or for one of those other valuations which sometimes come too heavily on owners of land? Probably it means all; at any rate, I think that would be the proper interpretation.

Again, the question is whether settled land here includes the mansion-house. I am not by any means sure that that was really in the contemplation of the Legislature having regard to the rest of the section; but the mansion-house is no doubt part of the settled land, and a very important part, and it would be too narrow a construction to say that the settled land does not include the mansion-house. Therefore, I will assume that we have here an engine-house which will improve the value of the mansion-house for some purpose or another, or more than one purpose in the sense I have mentioned, and as part of the settled land. The section does not stop there, because it says it must "increase the value of the settled land for agricultural purposes or as woodland or otherwise." It seems to me that that is a sentence of some difficulty, and by no means well framed. The expression "for agricultural purposes" may be easily understood. An engine-house which would enable the agricultural land to be better worked, and if better worked would increase its value, would be an engine-house within the section. But the

draughtsman of the Act has passed from "for agricultural purposes" to "or as woodland," which is rather a broad jump. There, again, I think we understand, it must be an engine-house which would increase the value of the land as containing wood, which I suppose is capable of being turned to some useful purpose; at least, I cannot conceive any engine-house which would increase the value of woodland standing alone and intended merely for ornament or shelter. It must mean, therefore, I think, increase the value as land containing wood, which wood may be converted to some useful and valuable purpose. So far, notwithstanding the somewhat vague language, there is no difficulty. Then we have the words "or otherwise." I am extremely sensible to the objection to limiting general words, because, as has often been said, you are denying the words the proper meaning which the English language has given them if you limit general words to anything less than the full extent of their meaning. Still, the rule of construing general words in such a connection as this as meaning only buildings ejusdem generis is well established, and I do not see how it is possible to avoid the application of the rule here. What comes in under ejusdem generis I am not prepared to say, but, looking back for a moment to the other objects enumerated in the section, namely, saw-mills, scutch-mills, and other mills, water-wheels, and kilns, one can see at once that there are many purposes as regards which an engine-house might add a value to the land besides the value of it for purely agricultural purposes or as woodland. Certainly a water-wheel might be used for grinding corn. A kiln might be used for making bricks, and an engine-house might be built in connection therewith. Grinding corn is an agricultural purpose certainly, but it has no connection with woodland. Making bricks comes, I think, in the same class. One could give many possible meanings of "otherwise," but I think one must limit it to that list of purposes ejusdem generis. How is an engine-house (which I will assume increases the value of the settled land, and the mansion-house as part of the settled land) a house which increases the value for purposes of that kind? It seems to me, to take the engine alone, that it is impossible to say so. The only object of the engine-house

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KEKEWICH is to increase the value of the land and mansion-house for occupation, possibly for sale, but not so as to convert the property to any such purpose as is there mentioned, namely, agricultural purposes, or woodland purposes, or any such other purpose as I have indicated, and are indicated by the other words in the section. Then I doubt whether I ought to divorce the engine-house from the purposes for which I know it is to be applied. It is an engine-house for the purpose of containing machinery to supply the mansion-house with electric light. Is that in any sense one of the purposes to which this section refers? It seems to me, giving it the widest possible construction, that it is not.

Then, going back to the words which I have omitted, "saw-mills, scutch-mills, and other mills, water-wheels, and kilns"—those are the objects which are specified in addition to "engine-houses"—they shew again directly what is, so to speak, in the mind of the Legislature. They are works not necessarily intended for trade purposes, but it seems to me that they all point to operations intended to convert the settled land to a useful purpose, and making it produce its proper product to greater advantage and so increase its value. That seems to be running all through the sections. You erect a saw-mill in order that you may cut up the timber which has been felled, and use it for the purpose of fencing and other purposes of the estate more conveniently and more economically as regards labour and otherwise; and the same as regards all the rest. Those are the purposes to which the section seems to me to be pointed, and I think it would be wrong to extend them so as to include an engine-house erected for the purpose in contemplation here, which is not to turn the settled land to advantage at all, not to use it for any other purpose than that for which it may be used as it stands, but to make it more convenient for occupation. It is a new point, and the framing of the section gives one considerable difficulty, but I should be going too far in saying that this engine-house should be paid for out of capital money.

With regard to the sum asked for the new drainage system, it seems to me to be a different case here from that which the

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Court had to consider in *In re Tucker's Settled Estates* (1), and I think Lopes L.J.'s judgment shews that one may give great weight to the difference. If a man in possession of settled land as tenant for life, namely, of a mansion-house, thinks some improvement in sanitary arrangements convenient for his own occupation, or for those who succeed him, he must, under the ordinary rule, pay for that if it is effected. He cannot ask the trustees to pay it, or, having done it, ask the trustees or the Court to recoup him. Improvements which may be styled permanent repairs may be both additions and repairs, but still belong to that class which it is not very easy to define, the expense of which, according to English habits, falls upon the tenant for life. This is not the case I have to deal with here. As I understand here, the tenant for life is faced with an imperfect system of drainage from the beginning to the end, extending from the outfall to the interior of the house, and, under advice, he has constructed an entire new system of drainage throughout, involving the alteration of rooms, connection of closets with the outer air, and so forth. It seems to me that the Court ought to look upon it as a whole, and not to be too exacting in its consideration of the different parts of the expenditure. If the Court finds that he has consulted matters of convenience only, that expenditure cannot be allowed, but if the expenditure has been substantially for the purpose of making one complete system of drainage, I think it ought to be allowed. I think the case of *In re Tucker's Settled Estates* (1), so far from being an obstacle in my way, rather shews that I may do it under different circumstances.

[His Lordship intimated that an affidavit should be made by Mr. Frank Graham Fairbank, of York, civil engineer, analysing the expenditure upon the basis thus laid down, and he should report to the Court what sums ought, in his opinion, to be charged against capital. This affidavit was subsequently made, allowing items to the amount of 2907*l.* 10*s.* 4*d.*, which included the items for structural alterations above mentioned, the hot and cold water supply, and the waste-pipes required for carrying

(1) [1895] 2 Ch. 468.

KEKEWICH the water from the baths and lavatory basins; and his Lordship in chambers allowed the expenditure out of the capital moneys.]

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Solicitors for all parties: *Milles, Jennings, White & Foster.*

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In re CHILDS' SETTLEMENT.

[1906 C. 2197.]

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June 12.

Settled Land—Tenant for Life—“Settlement”—Settlement of Personalty—Power to Invest in Land—Capital Money—Improvements—Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 2, sub-s. 1; ss. 33, 58, sub-s. 1, cl. ix.; s. 63—Settled Land Act, 1884 (47 & 48 Vict. c. 18), s. 7, sub-ss. (i.), (ii.).

A settlement of purely personal property in the names of trustees upon trust for a lady for her life, and after her death for her children on attaining twenty-one or marrying, contained a power to the trustees to invest the trust funds in the purchase of lands to be held by them upon trust for sale, and until sale to apply the rents and profits in accordance with the trusts of the personal property. The trustees invested part of the trust funds in the purchase of lands which were conveyed to them to be held upon the trusts of the settlement. The tenant for life desired to be recouped out of capital moneys for expenditure on improvements upon part of the land so purchased; and the question was raised whether the settlement came within the provisions of the Settled Land Act, 1882:—

Held, that the settlement, although not in its inception a settlement of land, was nevertheless a “settlement” upon trust for “persons by way of succession” within the definition in s. 2, sub-s. 1, of the Settled Land Act, 1882. It also came strictly within s. 63 of the same Act, and the lady must be deemed to be tenant for life within the meaning of the Act.

ADJOURNED SUMMONS.

By a settlement dated December 3, 1872, made between Annie Childs (then Annie Macrae, spinster), of the one part, and John Wrigley Macrae, James Hardy Macrae, and George Gordon Macrae, as trustees, it was declared that the trustees should stand possessed of a sum of 5000*l.* secured upon a mortgage of freeholds, and a moiety of 10,000*l.* secured upon a mortgage of leaseholds, and another sum of 9000*l.* upon trust to invest as

therein mentioned, and to pay the income thereof to Annie Macrae during her life, for her separate use, with remainder to her children, if any, as to sons on attaining twenty-one, and as to daughters on attaining that age or marrying, and if more than one in equal shares. And it was thereby declared that it should be lawful for Annie Macrae to appoint any part not exceeding one-half of the income of the trust investments to any husband she might marry during his life, with remainder, in default of such appointment, to her next of kin, under the Statute of Distribution, as if she had died possessed thereof intestate and without having been married. And it was thereby declared that it should be lawful for the said trustees or trustee for the time being, upon the request in writing of the said Annie Macrae during her life, to invest all or any part of the trust funds and premises, and for that purpose to convert into money or call in any stocks, funds, shares, or securities for the time being subject to the trusts thereinbefore declared, in the purchase of any freehold, copyhold, or customary manors, messuages, lands, tenements, or hereditaments in England or Wales for any estate of inheritance or of any leasehold messuages, lands, tenements, or hereditaments in England or Wales, to be conveyed, surrendered, or assigned to them or him, the said trustees or trustee, their or his heirs, executors, administrators, or assigns, according to the tenure thereof, upon trust for sale at the request in writing of Annie Macrae during her life and after her death at the discretion of the trustees, and to hold the proceeds upon the same trusts and subject to the same powers (including the present power) as the money laid out in the purchase of land would have been subject to if the same had not been so laid out, and in the meantime, and until the same should be sold, to pay or apply the rents and profits thereof, or of any part thereof for the time being remaining unsold, to the person or persons, for the purposes, and in the manner to whom, and for and in which, the dividends, interest, and income of the trust premises applied in the purchase thereof would have been payable or applicable under the trusts thereinbefore declared in case such purchase had not been made, it being thereby agreed and declared that the manors, messuages, lands, tenements, and hereditaments

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KEKEWICH which should be purchased under the power therein contained
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 1907 the same trusts as the money laid out in the purchase thereof
 CHILDS' would for the time being have been subject to if the same had
 SETTLE- not been so laid out. The present trustees of this settlement
 MENT, were Joseph Robert Diggle and the Right Reverend John
 In re. William Diggle, Lord Bishop of Carlisle.

On April 24, 1890, Annie Macrae married Christopher Childs, M.D., of Boscarn Looe, Cornwall, and there was one child of the marriage, the respondent Christopher Borlase Macrae Childs, who was born on May 18, 1891. No settlement was made on the marriage. In 1905 the trustees of the settlement, at the request of Annie Childs, invested 2751*l.*, part of the trust funds comprised in the settlement, in the purchase of freehold lands in the county of Cornwall, and the same were conveyed to them upon the trusts and subject to the powers and provisions of the settlement of December 3, 1872. In 1906 they invested a further sum of 14,000*l.* out of the same trust funds in the purchase of lands at Barbican Haye and Kellow, in the county of Cornwall, and these lands were also conveyed to them upon the trusts of the settlement. It was now asked by Mrs. Childs that a sum of 440*l.* out of the trust funds should be applied in discharge of the expenses incurred in a scheme for collecting and distributing water, with the necessary reservoirs, tanks, and other work, for the improvement of the property at Barbican Haye and Kellow. Accordingly a summons was taken out on behalf of Mrs. Annie Childs, asking (inter alia) that it might be declared that she was tenant for life or entitled to the powers of a tenant for life over the purchased hereditaments under the Settled Land Act, 1882, and that by virtue of s. 33 of the same Act the moneys and investments held by the trustees under the settlement of December 3, 1872, were capital moneys within the meaning of s. 21.

Charles S. Medd, for Mrs. Childs. It is objected that this settlement, being one purely of personal property, is not a settlement within the meaning of the Settled Land Act, 1882, and that Mrs. Childs is not a tenant for life. It is not ab initio

a settlement of land by way of trust for sale under s. 63, but there is a power in the settlement to invest in land, and the property is settled upon Mrs. Childs for life, with remainder to her children. Consequently she has the powers of a tenant for life within the meaning of s. 58, sub-s. 1, cl. ix., of the Act, and the moneys in the hands of the trustees are under s. 33 capital moneys which may be expended in permanent improvements. It is preferred to take a declaration in that form. In the case of *In re Moore* (1) there was a trust to invest personal estate in land, and land was subsequently purchased and conveyed to the trustees. This was held to be land "comprised in the settlement" within the Settled Land Act, 1890, s. 16.

Borthwick, for the infant remainderman. The settlement here is one of pure personalty, and there is no express trust to invest in land, but merely a power. It is submitted that there must be some land settled in the first instance by the settlement to bring it within the definition of a settlement in the Act. In all the cases under the Act this has been the case, or else there has been an express trust for investment in land. There is no case on all fours with the present. Sect. 33 of the Act presupposes a settlement of land, and s. 63 applies only to cases where there is a trust for sale. That does not apply to money coming from a settlement of personalty and invested in land.

J. F. W. Galbraith, for the trustees of the settlement.

KEKEWICH J. It is hard to believe that this point has never arisen before, because settlements of the character which I have before me are exceeding common, and there has been no indisposition within my experience to hold that a tenant for life of land under such circumstances falls within the powers given by the Settled Land Act, 1882, and the amending Acts. I am told, however, that it is a novel point, and I must decide it as if it were. It has been argued before me that no settlement can be treated as a settlement within the meaning of the Settled Land Act, 1882, unless it is in its inception a settlement of land, or contains an express trust to invest in land. It is not denied, of course, that from time to time other land might be added to

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(1) [1906] 1 Ch. 789.

KEKEWICH settled land by supplementary or other deed or devise, and settled to the same uses as those of the settlement, but it is said that it must begin with a settlement of land. I doubt very much whether that argument can stand on a fair construction of the Settled Land Act, 1882, and of s. 2, sub-s. 1, which defines what a "settlement" is, or that it can be supported on a fair construction of s. 63 of the same Act, which only applies if it is a settlement within the meaning of the Act. But, before looking at these sections more closely, I must consider what the settlement itself is. [His Lordship read the important parts of the settlement of December 3, 1872, and continued:—] I do not know why that is not a settlement of land within the meaning of the Settled Land Act. It is not a settlement of land in its inception, and the land, which there is a power to purchase, is not intended to be held as part of the trust property, inasmuch as there is an absolute trust for sale which is intended to effect a conversion and prevent the land going as land. But in the meantime, and until sale, the land is to be held by the trustees upon trust for persons by way of succession. Sect. 2, sub-s. 1, of the Act defines a "settlement," and provides that any deed, will, or other instrument, "under or by virtue of which instrument or instruments any land, or any estate or interest in land stands for the time being to or in trust for any persons by way of succession, creates or is for the purposes of this Act a settlement."

I cannot get out of the language, which seems to me to hit the facts of this case exactly. Although there was no land comprised in the settlement in its inception, there was power to invest in land, and the investment having been made by the trustees under the power it seems to me that I have got a declaration by the Legislature as plain as possible that there is now a settlement of this land within the meaning of the Act. The 63rd section is also quite consistent with that. This property is vested in the trustees upon trust for sale, and not necessarily for reinvestment in land. The section deals with land which "is subject to a trust or direction for sale of that land, estate, or interest, and for the application or disposal of the money to arise from the sale, or the income of that money, or

the income of the land until sale, or any part of that money or income, for the benefit of any person for his life, or any other limited period," and such land is to be deemed to be settled land. Here I have land vested in these trustees with a direction that they are to apply the money to arise from the sale, or the income derived from the land until sale, for the benefit of this lady, the tenant for life. Here again the case comes strictly within the Act, and I do not see my way out of it. It seems to me, therefore, upon the first point, whether this is a "settlement" within the meaning of the Act, that I am bound by the Act itself. Then comes the question whether this lady is entitled to the powers of a tenant for life. The settlement seems to me to come within s. 63 of the Act, and not within any other section. That section says, "and the person for the time being beneficially entitled to the income of the land, estate, or interest aforesaid until sale, whether absolutely or subject as aforesaid, shall be deemed to be tenant for life thereof." It does not very much matter whether Mrs. Childs is treated as having the powers of a tenant for life, or as being tenant for life. Mr. Medd is content to take an order in the form that she has the powers of a tenant for life, and relies upon s. 58, sub-s. 1, cl. ix., but I think the proper form of order in a case coming under s. 63 is that the applicant shall be deemed to be tenant for life. There will, therefore, be a declaration that she is to be deemed tenant for life of the land subject to the settlement within the meaning of the Settled Land Act, 1882. Consequently, under the Act of 1884, s. 7, sub-s. 2, the powers given by s. 63 must be exercised only with the leave of the Court, and the person must be named to whom the leave is given.

Solicitors: *R. W. Childs, Batten & Harling, for Childs & Son, Liskeard; Field, Roscoe & Co., for Oliver Jones, Billson & Co., Liverpool.*

G. M.

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June 19.*In re* JACKSON.JACKSON *v.* WARD.

[1906 J. 655.]

Presumption of Death without Issue—Evidence—Sufficiency—Practice.

There is no presumption of the death of a person without issue; it is a matter to be proved by sufficient evidence.

ADJOURNED SUMMONS.

By his will, dated December 12, 1882, Thomas Jackson, a London City missionary, appointed his son, the plaintiff John Rishton Jackson, and his wife Elizabeth Jackson executors thereof, and after payment of his debts and funeral and testamentary expenses, gave all his estate and effects to his executors upon trust to allow his wife to receive the income of his residuary estate for her own use during her life, and after her decease, as to the income from his said estate, he directed his executors to apply the same equally for the benefit of his children and his step-daughter Elizabeth Hannah Knowles during their respective lives, the same to be laid out by his executors in their absolute discretion in a particular way therein directed, and after the decease of any child, or his step-daughter, the testator gave the share of such child unto his or her child or children who should attain the age of twenty-one years, and if more than one equally; but if such child of his or his step-daughter should die without leaving issue, or if no issue of any such child who might leave issue should attain the said age, then the share of such child should go equally amongst the others of such children.

The testator died on November 16, 1883, and his will and a codicil thereto were proved by the executors on December 14, 1883. Elizabeth Jackson died on September 24, 1888. There were eight children of the testator living at his death. Another son of the testator, namely, Thomas Bevan Jackson, left England between the years 1860 and 1866 as a sailor for Australia.

The plaintiff in his affidavit stated that it was believed by the

family that T. B. Jackson when he arrived in Australia deserted his ship and changed his name to L. Ashley. Letters had been received from him by his sister Margaret Caroline Jackson from time to time up to 1867. Two of these letters were made exhibits to the affidavit. In one of them, which was undated, T. B. Jackson expressed his wish to see his family before he died, and said, "for I feel very certain my life is nearly done on earth." He also desired his sister to ask a lady whom he mentioned to send him a line and her likeness, and said he was poor and in bad health. In another letter, dated April 16, 1866, and apparently written after the previous letter, he stated he was worth 8000*l*. He also referred to the same lady as before mentioned in affectionate terms and wished that he could marry her, stating that he had got her likeness cut small so that he could wear it in his watch-chain locket. Nothing was heard of or from T. B. Jackson since about the year 1871. In 1890 advertisements were inserted in various Australian papers describing him and inviting him or his children to communicate with John Jackson, of 58, Chobham Road, Stratford, Essex, England, when they would hear of something to their advantage. No replies were received. The plaintiff retained one-ninth part of the income of the testator's estate and accumulated it as representing the share of T. B. Jackson in case he should be alive. This sum amounted to 127*l*. 3*s*. 2*d*. Three of the testator's daughters had died after the death of the testator, two of them leaving no issue, and one leaving a son, Sydney John Ward, who had attained twenty-one, and was the first defendant. Elizabeth Hannah Knowles died on May 4, 1903, leaving six children, three of whom were also defendants.

An originating summons was taken out by the plaintiff on April 10, 1906, asking (*inter alia*) that directions might be given for the distribution of the testator's residuary estate upon the footing of T. B. Jackson having predeceased the testator, or, in the alternative, having died after the testator without leaving any issue, and that it might be declared that the death of the said T. B. Jackson before the testator, or subsequently and without leaving any issue, was to be presumed.

The matter came before Joyce J. on July 5, 1906, when an

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KEKEWICH order was made declaring the construction of the will, and an inquiry was directed whether Thomas Bevan Jackson was living or dead, and if dead when he died, and in particular whether he was living or dead on November 16, 1883, the date of the testator's death, or whether he was living or dead on the respective dates of the death of the two sisters who died leaving no issue, and whether he left any child or children.

The Master directed advertisements in certain papers, and no person had come in. The question of presumption of death was reserved by him for the consideration of the Court.

J. M. Stone, for the plaintiff, referred to the case of *In re Aldersey* (1), and asked that the estate might be distributed on the basis that T. B. Jackson had died in the lifetime of the testator, and without issue. All the evidence that was possible had been obtained.

W. M. Cann and *F. Whinney*, for grandchildren of the testator.

Austen-Cartmell, for a daughter of the testator. No direct evidence has been produced that T. B. Jackson was unmarried when he left England for Australia, but that could be obtained.

KEKEWICH J. I have no difficulty in finding, on the evidence before me, that Thomas Bevan Jackson died before the testator. The question whether he left any children is a much more difficult one. There is no evidence except his own letters as to whether he died married or not having been married. It is a point which frequently comes before the Court, and I very seldom find the matter properly dealt with on the affidavits in the first instance before the Court. Almost always I have to send the case back for further evidence.

Whenever the question occurs I invariably refer to two cases which seem to lay down a rule and a guide. The first case is *Doe v. Griffin*. (2) It is strictly not so much to that case itself which I refer as to the note to the earlier case of *Richards v. Richards* (3) which is there mentioned. The note

(1) [1905] 2 Ch. 181.

(2) (1812) 15 East, 293.

(3) (1731) 15 East, 294, n.

is this: "In ejectment the lessor of the plaintiff claimed as heir by descent, and shewed the death of his elder brothers, but not that they died without issue. Curia. This must likewise be proved." The rest of the note I will not read. That came before the Exchequer Division in the case of *Greaves v. Greenwood* (1), and Bramwell B. (2) refers to the note to the case of *Richards v. Richards* (3) which I have just read, and says: "That may be taken to be right, it being a matter reasonably within the capability of proof by the plaintiff, not being without the time of living memory, and the persons who were dead being his elder brothers only; I should, with all respect, therefore, say that what the Court said so far was right, for it was a thing which the plaintiff could prove, and if he does not prove it the jury would say they were not satisfied that he is the heir." Then he goes on to comment on the other part of the note, and from that he differed, but I need not say anything more about it. He accepts the note in *Richards v. Richards* (3) that a plaintiff suing in ejectment had satisfactorily to prove that his elder brothers died without issue. I take that to mean that when it is a question for a jury the judge would direct them as to what evidence would be reasonably sufficient to justify their verdict. What I have to consider in this particular case is whether a jury would be justified in finding death without issue, being properly directed by a judge. The case I have mentioned went to the Court of Appeal, and there is just one passage in the judgment of Cockburn C.J. which goes the same way. The Chief Justice says (4): "I quite agree in the position taken by Mr. Herschell, that there is no presumption in a matter of this kind." That is why I am dwelling upon the case because I am asked to presume not only death but death without issue. He says there is no presumption, and then he continues: "If it is proved that long ago a man died, and there is nothing to shew whether he died with issue or without issue, I agree in the American doctrine that there is no presumption either way." I have always acted upon that. You cannot get conclusive negative evidence in the large majority of

(1) (1877) 2 Ex. D. 289.

(2) *Ibid.* 293.

(3) 15 East, 294, n.

(4) 2 Ex. D. 295.

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KEKEWICH cases, indeed it is very seldom forthcoming; but you can get some evidence upon which a jury, properly directed, can act, and therefore evidence upon which a judge may properly act.

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JACKSON, *In re.* That is the task I always put before myself in these cases, and it is one which I do not think is properly appreciated by those who bring the cases before the Court. It is not a case of presumption but of proof, sufficient if not conclusive proof. In the present case it may be that this young man left England so early in life that the Court would not hesitate to say that he was not married at that time, but as there can be evidence that he was not married, that must be obtained. What else have I? Of course I must expect evidence that his relations never heard of his being married. But the only direct tidings that they have of him were tidings contained in two letters of his own. In the second letter dated in 1866 he refers to a lady living in England in terms which shew that he had been attached to her before he left England, and was still attached to her, and nothing would have pleased him more than to have been able to marry her. That is a clear statement by him, as I read the letter, that he was not married to any one else. That is some years before I can treat him as having died. In this case it is impossible to get conclusive evidence, but I think there is evidence on which a jury could be properly directed that he died a bachelor. I find, therefore, that the estate in question ought to be distributed on the footing that T. B. Jackson died in the lifetime of the testator and a bachelor.

Solicitors: *Stones, Morris & Stone; Phelps & Wallace.*

G. M.

DAWSON v. BRAIME'S TADCASTER BREWERIES, KEKEWICH
LIMITED. J.

[1907 D. 531.]

1907
June 20.

Brewery Company—Debenture Trust Deed—Mortgaged licensed Premises—Security not yet enforceable—Trustees' Powers—Power to sell and convert—Investment of Proceeds of Sale—Non-renewal of Licence—Licensing Act, 1904 (4 Edw. 7, c. 23), s. 2—Compensation—Capital Moneys—Applicable as Proceeds of voluntary Sale.

A brewery company assured all its licensed premises to trustees upon the trusts of a debenture trust deed, which was in the usual form, for securing an issue of debenture stock, the premises being held by the trustees on trust to permit the company to hold and enjoy the same and to carry on thereon the business of the company until the security thereby constituted became enforceable (which event had not happened), and then upon the usual trust for sale and conversion. The deed provided by clause 17 that at any time before the security thereby constituted became enforceable the trustees might (inter alia) sell and convert, or concur in selling and converting, all or any of the mortgaged premises in the same manner as they could do if the primary trust for conversion had then arisen; and, by clause 18, that the trustees should hold the capital moneys arising under clause 17 upon trust to lay out the same in (inter alia) the purchase of the licensed premises suitable to be held for the purposes of the company:—

Held, that moneys paid under the Licensing Act, 1904, for compensation for the licence of one of the mortgaged premises comprised in the trust deed were capital moneys arising under clause 17 as above set out, and were applicable under the provisions of clause 18.

Law Guarantee and Trust Society v. Mitcham and Cheam Brewery Co., [1906] 2 Ch. 98, explained.

Noakes v. Noakes & Co., [1907] 1 Ch. 64, approved.

ADJOURNED SUMMONS.

This was a summons by the trustees of a trust deed dated July 26, 1899, securing debenture stock issued by the defendant company, for a declaration that the sum of 730*l.*, being money paid under the Licensing Act, 1904, for compensation for the licence of the Lord Nelson inn, Knaresborough, one of the premises comprised in the trust deed, should be held by them as capital moneys under clause 17 of the trust deed to be applied in the manner provided in clause 18.

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The defendant company was incorporated under the Companies Acts in September, 1895, and in 1899 issued 100,000*l.* debenture stock, secured by the trust deed above-mentioned, and made between the defendant company of the one part and the plaintiffs of the other part. The licensed premises in question were copyhold, and were, together with the other premises, freehold, copyhold and leasehold, duly assured or covenanted to be surrendered to the plaintiffs, as trustees of the trust deed and in pursuance of clause 8 thereof, to be held by them on trust to permit the company to hold and enjoy the same premises and to carry on thereon the businesses authorized by the memorandum of association of the company until the security thereby constituted became enforceable, and then upon trust to sell the same as therein provided. The security had not become enforceable.

In June, 1906, the justices refused to renew the licences of the Lord Nelson, and the compensation committee assessed the compensation at 800*l.*, of which 70*l.* represented the tenant's interest. The trustees were not represented in the proceedings before the committee, but concurred in the line of action adopted by the defendant company, and agreed to accept the sum so awarded as sufficient compensation.

The defendant company having requested the plaintiffs to invest the money in the purchase of other licensed premises to be held by the company for the purposes of its business, the trustees were willing to comply with the request, but, before doing so, desired to obtain the opinion of the Court upon the question whether they had power to apply the money as capital money in the manner suggested. The trustees accordingly took out the present summons.

By the trust deed the company covenanted to convey, surrender and demise to the plaintiffs certain freehold, copyhold and leasehold premises mentioned in the schedule thereto, and including the Lord Nelson inn; and by clause 7 charged in favour of the trustees the company's other assets for the time being by way of a floating charge to secure the payment of all moneys for the time being owing on the security of those presents. Clause 8, after providing that until the security thereby constituted should become enforceable the mortgaged

premises should be held upon trust as above mentioned, contained the usual trust for the sale, calling in, collection, and conversion into money of the mortgaged premises comprised in the security upon the security thereby constituted becoming enforceable. The further material clauses of the deed provided as follows:—

Clause 17: "At any time before the security hereby constituted becomes enforceable the trustees or trustee may upon the application and at the cost of the company do or concur in doing all or any of the things following that is to say:—

"(1.) May sell and convert or concur in selling and converting all or any of the mortgaged premises in the same manner as they or he could do if the primary trust for conversion had then arisen."

"(7.) Generally may act in relation to the mortgaged premises in such manner as the trustees or trustee may think expedient and may concur in any other dealing with the mortgaged premises not hereinbefore provided for. . . ."

Clause 18: "The trustees or trustee shall hold all net capital moneys arising under the last preceding clause hereof upon trust to lay out the same or any part thereof if they or he shall think fit in" (inter alia) "the purchase subject or not subject to incumbrances of other property suitable to be held for the purposes of the company including freehold copyhold and leasehold hereditaments goodwill licences book debts rights of way easements and other assets and so that any hereditaments so purchased shall be conveyed or assured subject to the incumbrances (if any) thereon in such manner as the trustees or trustee shall require so as to become subject to all the trusts powers and provisions herein contained."

Clause 19 provided that, subject as aforesaid, the trustees or trustee should invest the net capital moneys referred to in the last preceding clause upon some or one of the investments thereafter authorized; and clause 21 specified the authorized investments.

P. F. Wheeler, for the trustees. The trustees are in doubt whether they have power to deal with this money in any other

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KEKEWICH way than by investing it in trust securities, after what fell from
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your Lordship when giving judgment in *Law Guarantee and Trust Society v. Mitcham and Cheam Brewery Co.* (1), to the effect that the trustees in that case were not entitled to apply the money in reducing the amount of their mortgage, nor were they entitled to use it in any way. They are willing to invest the money as the company desires, provided that they have the power to do so. The question is whether these are "capital moneys" arising under clause 17 of the trust deed. That clause refers to voluntary acts only on the part of the trustees; it does not contemplate such an event as has happened, and which was one that the trustees had no power to resist. The justices in effect said that they must confiscate the licence, and the trustees had no option in the matter, and all they did was to accept the decision and the compensation when assessed. But that is not acting in relation to, or concurring in any dealing with, the mortgaged premises within the meaning of the clause.

P. O. Lawrence, K.C., and *Hon. Frank Russell*, for the defendant company. The company admits that these moneys are payable to the trustees in accordance with the decisions in *Law Guarantee and Trust Society v. Mitcham and Cheam Brewery Co.* (1) and *Noakes v. Noakes & Co.* (2), but desires that they may be invested in the purchase of other licensed premises to be held for the purposes of the company's business. There is no clause in this trust deed giving power to adjust or compromise, as there was in the deed in *Noakes v. Noakes & Co.* (2); but sub-clause 7 of clause 17 of this deed is in almost identical words as sub-clause 9 of clause 20 of the deed in that case, and we submit that at any rate under sub-clause 7 these moneys are capital moneys arising from an "act in relation to" or from a concurrence "in any other dealing with the mortgaged premises not hereinbefore provided for." In *Noakes v. Noakes & Co.* (2) it was said in argument that your Lordship, in giving judgment in *Law Guarantee and Trust Society v. Mitcham and Cheam Brewery Co.* (1), decided that the compensation money must be invested in trust investments; but we submit that your Lordship

(1) [1906] 2 Ch. 98, 105.

(2) [1907] 1 Ch. 64.

only meant that the trustees could not use it for the purposes of redemption of their trust security, and not that they could not use it for purposes authorized by the trust deed.

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KEKEWICH J. There falls to be decided in this case a question which was not touched upon in the case of *Law Guarantee and Trust Society v. Mitcham and Cheam Brewery Co.* (1) I say "was not touched upon," because, although there are some words in the judgment in that case which, read alone and apart from the context, might be taken as expressing an opinion as to the use to which the money might be applied, the only question before the Court in that case was whether the money belonged to the mortgagor or the mortgagee. There was no discussion upon any other question, and any language used with regard to dealing with the money had reference only to the right to the money as between mortgagor and mortgagee, and must be treated as not applying to the question what the mortgagees or trustees were to do with the money.

In this case the point arises in a similar set of circumstances to those in the case to which I have just referred, but now the question is, not generally what are the trustees to do with the money, but whether they may invest it in the purchase of other licensed premises to be conveyed to the trustees and held by them subject to all the trusts, powers, and provisions contained in the trust deed. Whether that can be done depends entirely upon the construction of a few clauses in the trust deed, and particularly upon the construction of clause 18. [His Lordship read clause 18, and continued:—] Now, amongst the other objects to which the trustees may devote capital moneys is the purchase of other licensed premises. If, therefore, these are "capital moneys arising under the last preceding clause," then the trustees are at liberty to do what the company desires them to do.

I turn to clause 17, and I find that under sub-clause 1 the trustees "may sell and convert or concur in selling and converting all or any of the mortgaged premises in the same manner as they . . . could do if the primary trust for conversion had then arisen." That refers to the earlier trust in the deed

(1) [1906] 2 Ch. 98, 105.

KEKEWICH specifying the duties of the trustees when the floating charge is put into action. Have the trustees sold and converted, or concurred in selling and converting, the particular premises in question?

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It is said on behalf of the trustees that they have done nothing; that these premises have been converted against their will, and that they have not been parties to the transaction in any way; that the Legislature has intervened, and has insisted that some part of their property shall be sold, that is, shall be surrendered or given up in consideration of a certain sum of money to be ascertained in the manner prescribed by the Legislature; that the trustees stood aside and did not consent, and that now they have to take the money which the Legislature has provided for them. Now, is that selling and converting or concurring in selling and converting within the meaning of the clause?

When the Court comes to the conclusion that in a will or other instrument there is a *casus omissus*, then the Court is bound to adopt that conclusion regardless of all consequences. It is generally said, whether always accurately or not, that the Court leans against an intestacy, but when once the Court has seen that there must be an intestacy, the fact that the money will go to far distant relatives does not influence the Court against deciding in favour of an intestacy. But if the Court finds that a testator, or that parties to a contract, have contemplated money coming in by a particular method accurately described, and from the force of external circumstances money has come in, not by the method contemplated by the testator or contracting parties, but by some method other than that described but of a like character, then the Court is justified in saying that there is not a *casus omissus*, but that the words of the will or contract may be fairly applied to the case in hand. That is what has happened in this case. In *Law Guarantee and Trust Society v. Mitcham and Cheam Brewery Co.* (1) I instanced the cases of a purchase under the Lands Clauses Act or Michael Angelo Taylor's Act, and said that a purchase under those Acts was really similar to what had been done under the Licensing Act of 1904. At the same time I said that it was

(1) [1906] 2 Ch. 98, 105.

never safe to trust analogies too far, and on reflection I am inclined to think that the analogy is not sufficient. The trustees in the present case have been compelled to sell part of their property. But even so, are they not the vendors? They have been actors in the drama, and their property has been sold. I do not think it is too strong an application of this language to say that they have sold and converted or concurred in selling and converting, and, if so, the money coming from the sale and conversion is "capital money" in their hands "arising under the last preceding clause" within the meaning of clause 18.

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That gets over, or gives the go-by to, the objection which I entertain to calling in aid the provisions of sub-clause 7 of clause 17 of the trust deed. The words of that sub-clause are very wide. I do not wish to say that they would not cover the present case, nor do I wish to prejudice that question if it should arise on any future occasion, but I think that there would be more difficulty in saying that this money has arisen from any act or dealing of the trustees within the meaning of that sub-clause than there is in saying that it has arisen under sub-clause 1, and I think that in the present case it would be safer and better not to rely upon sub-clause 7.

I ought not to omit to say that I am really proceeding on the same lines as those of Neville J.'s decision in *Noakes v. Noakes & Co.* (1), although in that case there was a clause for settling, adjusting and compromising all accounts, reckonings, controversies, questions, claims and demands in relation to the mortgaged premises—a clause which is wider than many clauses of that nature. I have not the slightest doubt that the decision in that case was right. I have not had to deal with that particular language in the present case, but in substance I entirely agree with that decision.

There will therefore be a declaration that this is capital money arising under clause 17 of the trust deed.

Solicitors: *Field, Roscoe & Co., for Taylor, Jeffery & Jessop, Bradford; Rawle, Johnstone & Co., for Ramsden, Sykes & Ramsden, Huddersfield.*

(1) [1907] 1 Ch. 64.

NEVILLE J. *In re* SOUTH EASTERN RAILWAY COMPANY AND
WIFFIN'S CONTRACT.

1907

June 20.

[1907 S. 1441.]

Vendor and Purchaser—Railway Company—Special Act—Land acquired for extraordinary purposes—Conveyance subject to Restrictive Covenant—Resale of Part of Land not required—Validity of Covenant—Ultra Vires—Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 45—Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), ss. 13, 127, 128.

By a special Act a railway company were authorized to acquire certain land for the purpose of enlarging their stations "and for other purposes of and connected with their undertaking." Under this power the railway company acquired the land by voluntary agreement and covenanted in their conveyance that they and their assigns would at all times thereafter use the land for a passenger station "and for no other purpose." Afterwards the railway company contracted to sell part of the land that they did not require, and the purchaser required the covenant to be released:—

Held, that the covenant was ultra vires the railway company, and that they could sell free from the restrictions contained in it.

The principle of *Ayr Harbour Trustees v. Oswald*, (1883) 8 App. Cas. 623, applied.

ADJOURNED SUMMONS.

The South Eastern Railway Company by their special Act of 1884 were empowered (s. 5), in addition to the other lands which they were by the Act authorized to acquire, from time to time to "enter upon, take, use and appropriate for the purpose of enlarging and extending their stations and siding accommodation and for roads and approaches and for other purposes of and connected with their undertaking the lands" thereafter described and delineated on the deposited plans and books of reference. Under this power the company in 1889 acquired by voluntary agreement about two and a half acres of land described in the deposited plans, and it was duly conveyed to them. By the conveyance the company covenanted for themselves and their assigns with the grantors, their heirs and assigns, that the company and their assigns would "for ever thereafter use the said piece of land thereby conveyed with the buildings then and thereafter to be

erected thereon as a passenger station for the accommodation of the traffic of their line and for no other purpose." In March, 1907, the company contracted to sell about one acre of this land, which they did not require, to one Whiffen free from incumbrances. The purchaser objected that the restrictive covenant bound the land and must be released. The company insisted that the covenant was void and that they were entitled to sell the land free from the restrictions contained in it, and took out a summons under the Vendor and Purchaser Act, 1874, for a declaration that a good title had been shewn to the land.

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P. F. Wheeler, for the summons. It was not competent for the company to contract not to use their statutory powers. The principle of *Ayr Harbour Trustees v. Oswald* (1) and *Mulliner v. Midland Ry. Co.* (2) applies. This was land acquired for extraordinary purposes within the meaning of s. 45 of the Railways Clauses Consolidation Act, 1845, which the company could under s. 13 of the Lands Clauses Consolidation Act, 1845, sell to any purchaser. The words "and for no other purpose" in the covenant cut down the general powers in s. 5 of the special Act, and also restrict the general power of sale in s. 13 of the Lands Clauses Act, under which the company are selling. In *Walker v. London Tramways Co.* (3) and *In re Peveril Gold Mines, Ltd.* (4) it was held that companies incorporated under the Companies Acts could not contract themselves out of their statutory rights. The analogy of those decisions applies here. Further, if the covenant has any effect, it is in the nature of a personal covenant, and only binds the land so long as the company hold it, and does not affect the land in the hands of a purchaser for value: *Austerberry v. Oldham Corporation.* (5)

S. Dickinson, for the purchaser. The purchaser has bought this land for building purposes, and wants to be safe. If the principle of *Ayr Harbour Trustees v. Oswald* (1) applies, then the covenant is bad; but it is submitted that that case is distinguishable, and that the covenant is good. That case

(1) 8 App. Cas. 623, 639.

(3) (1879) 12 Ch. D. 705.

(2) (1879) 11 Ch. D. 611.

(4) [1898] 1 Ch. 122.

(5) (1885) 29 Ch. D. 750.

NEVILLE J. decides that where land is taken compulsorily for the general undertaking, the company cannot covenant not to use it. Here the land was acquired by voluntary agreement for extraordinary purposes. If this were a sale of "superfluous" land, the title would be bad, because it is land outside a town and has not been offered to the adjoining owners: ss. 127 and 128 of the Lands Clauses Act. But this was land taken by agreement for extraordinary purposes under s. 5 of the special Act and s. 45 of the Railways Clauses Act, and in such cases it is competent for the company to enter into a restrictive covenant in relation to it. They are not bound to sell any of the land they do not require, but have a general power under s. 13 of the Lands Clauses Act to sell to any person, and, if they do so, it is submitted that the principle of *Ayr Harbour Trustees v. Oswald* (1) does not apply, and that the covenant must be released.

P. F. Wheeler, in reply.

NEVILLE J. In this case the land in question was acquired under the provisions of s. 5 of a special Act, which provides: "Subject to the provisions of this Act the company, in addition to the other lands which they are by this Act authorized to acquire, may from time to time enter upon, take, use and appropriate for the purpose of enlarging and extending their stations and siding accommodation and for roads and approaches and for other purposes of and connected with their undertaking the lands, houses and buildings hereinafter described or referred to." Now, having acquired the land under that section by voluntary agreement, the company entered into the following covenant for themselves and their assigns, "that they the company and their assigns will for ever hereafter use the said piece of land hereby conveyed with the buildings now or hereafter to be erected thereon as a passenger station for the accommodation of the traffic of their line with the necessary yard and approaches and for no other purpose." It is clear there were other purposes prescribed by s. 5 of the Act to which the company could, in the exercise of their powers, devote the land, and the question is whether, having restricted themselves to one of those purposes,

(1) 8 App. Cas. 623.

that restriction is ultra vires or is binding upon the company. NEVILLE J. I think that depends upon the construction of the decision of the House of Lords in the case of *Ayr Harbour Trustees v. Oswald*. (1) I think the principle of that case is summed up by Lord FitzGerald where he says (2): "When the defenders shall have completed their title to the land in question, they will acquire that land in full ownership for the purposes defined by their special Act and cannot lawfully accept it otherwise. My Lords, I am of opinion that having so acquired that land for the purposes expressed in s. 4 and amplified in s. 10 of their special Act, they have no power in law to preclude themselves or their successors from the exercise of their statutable powers over it, as should be from time to time required for the purposes of the harbour." Now applying that decision to this case, I think the company have undoubtedly purported to deprive themselves of the right to exercise over the land which they acquired under s. 5 any of their powers other than the one specified in the covenant. I think, therefore, that the case falls within the principle of *Ayr Harbour Trustees v. Oswald* (1), and that the covenant is bad. The result is that the requisition has been sufficiently answered by the vendors, and that a good title to the land has been shewn.

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Solicitors: *J. W. Watkin; Young, Jones & Co.*

(1) 8 App. Cas. 623.

(2) 8 App. Cas. 640.

H. L. F.

NEVILLE J.

GLOSSOP v. GLOSSOP.

1907

[1907 G. 1034.]

June 27.

*Company—Director—Managing Director—"Vacating Office"—Resignation—
Withdrawal before Acceptance—Articles—Construction.*

A director of a limited liability company can, subject to the articles of the company, resign his office on giving a proper notice to the company, and such notice when once given cannot be withdrawn without the consent of the company.

The articles of a limited liability company provided (article 84) that the office of a director should be vacated (*inter alia*) if by notice in writing to the company he resigned his office, provided that the vacation of office should not take effect unless the directors should pass a resolution to the effect that he had vacated his office, such resolution to be passed within six months from the happening of the event whereby such director had vacated his office; and (article 85) that the office of a managing director should be vacated upon the happening of any of the contingencies mentioned in article 84 whereby the office of a director should be vacated. A managing director of the company wrote to the company resigning his office of managing director, but, before the next meeting of the board, he wrote again to the company absolutely withdrawing his resignation. At the next meeting of the board a resolution was passed that the managing director had vacated his office:—

Held, that the whole of article 84, including the proviso therein, was imported into article 85; that the managing director could not withdraw his resignation without the consent of the company; that by his letter of resignation he vacated his office; and that the resolution of the board was effective and valid.

MOTION.

William Glossop & Bulay, Limited, were incorporated in December, 1900, under the Companies Acts, 1862 to 1900. The articles of association, so far as material, were as follows:—

"Article 70. The first directors shall be William Glossop, Alfred Bulay Glossop and Francis Watson.

"Article 71. The said William Glossop shall be the chairman of the board of directors and one of the managing directors and shall be paid a salary of 500*l.* per annum, but shall not otherwise participate in the directors' fees. The said Alfred Bulay Glossop shall be the other managing director and shall be paid a salary

of 350*l.* per annum for the first two years after the registration of the company, and thereafter 500*l.* per annum, but shall not otherwise participate in the directors' fees. The said Francis Watson shall be paid 50*l.* per annum, together with a further fee of one guinea for each meeting of directors attended by him during the year. . . .

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"Article 72. The managing directors shall, except during the usual holidays and in case of illness, diligently and faithfully devote the whole of their attention to the business of the company. . . .

"Article 73. None of the said William Glossop, Alfred Bulay Glossop and Francis Watson shall be liable to retire by rotation under the provisions herein contained, but they shall respectively, subject to the provisions contained in clauses 84 and 85 hereof, continue to act as aforesaid so long as they shall respectively be duly qualified, and shall desire to act."

Article 75 provided for the share qualification of every director.

Article 76 provided for the retirement by rotation of the directors, other than the said managing directors, at annual general meetings of the company.

"Article 84. The office of director shall be vacated (*inter alia*).— If he become bankrupt If he be declared a lunatic If by notice in writing to the company he resigns his office, provided that, except in case of loss of qualification in shares or of actual lunacy or bankruptcy, the vacation of office shall not take effect unless the directors shall pass a resolution to the effect that the director has vacated his office, such resolution to be passed within six calendar months from the happening of the event whereby such director has vacated his office.

"Article 85. The office of managing director shall be vacated upon the happening of any of the contingencies mentioned in clause 84 hereof, whereby the office of director shall be vacated, and, in addition, the office of managing director shall be vacated upon a breach by him of clause 72 hereof, or if he shall, except in the case of illness, refuse or neglect to attend to the business of the company, &c., provided that the vacation of office for the additional reasons specified in this clause shall not take effect unless the directors shall pass a resolution that the managing

NEVILLE J. director has vacated his office, such resolution to be passed within
1907 six calendar months from the happening of the event whereby
GLOSSOP such managing director has vacated his office.”

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In 1900 special resolutions were duly passed whereby (inter alia) the name of the company was altered, and the number of managing directors was increased to three by a Mr. W. W. Bulay being made a managing director.

On May 16, 1907, A. B. Glossop, in consequence of a dispute with W. Glossop, wrote the following letter to the company :—

“Please accept my resignation as managing director of this company, and kindly forward me cheque for my salary due to this date. I enclose you my keys.”

But on May 23, before any meeting of the directors had been held, he wrote the company as follows :—

“Whereas on the 16th instant I gave you notice in writing of my intention to resign my position as managing director of your firm, I now hereby inform you that such resignation was made under a misapprehension, and I hereby absolutely withdraw the same.”

Both of these letters were received by the company before May 24; and on that day a special meeting of directors was held at the registered offices of the company, W. Glossop, W. W. Bulay and F. Watson being present, when the following resolution was passed :—

“Resolved that the letter of resignation dated May 16, 1907, from Mr. Alfred Bulay Glossop resigning his office as managing director having been read, it is declared that he has vacated his office.”

A. B. Glossop attended this meeting and tendered his vote against the resolution, but his vote was not accepted, and he was not allowed to join in the business before the board, and subsequently the directors claimed to exclude him from the offices of the company and from taking part in the management of the affairs of the company either as a director or as managing director on the ground that he had vacated his office. Thereupon A. B. Glossop issued the writ in this action against the directors and the company claiming (1.) a declaration that he still held the

office of a managing director of the company, and (2.) an injunction to restrain the defendant directors from excluding him from the office of managing director of the defendant company or from excluding him from acting as a director of the defendant company or from excluding him from any meetings of the directors of the defendant company. The plaintiff now moved for an interim order.

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It appeared that the keys, which were handed back to the plaintiff at his request on May 17 for a particular purpose, had been retained by him, but were subsequently by arrangement returned to the company without prejudice to the questions that had arisen.

Waggett (Jenkins, K.C., with him), for the plaintiff. The articles form the contract between the parties, and as a director the plaintiff never resigned at all. As a managing director he withdrew his resignation in time. The letter of May 16 was not an absolute resignation. It was really equivalent to a proposal or offer to resign, analogous to an offer in any other contract, and could be withdrawn before acceptance. Therefore there was nothing before the board on May 24 on which they could pass an effective resolution. There is no case in the books exactly like the present. A director is liable for all the acts of the board until his resignation has been accepted: *Municipal Freehold Land Co. v. Pollington*. (1) Acceptance is necessary, and it is submitted that, where the directors have six months in which to pass a resolution accepting the resignation, the resignation can be withdrawn before such a resolution has been passed.

Gore-Browne, K.C., and P. F. Wheeler, for the defendants. We do not now contend that the plaintiff is not a director of the company, but we say that his resignation as managing director was complete and effectual on May 16. The office of a director can be resigned at will so long as a proper notice is given: *Maitlands' Case* (2); and *Reg. v. Wigan Corporation* (3) and *Finch v. Oake* (4) are instances where it was held that a

(1) (1890) 59 L. J. (Ch.) 734. (3) (1885) 14 Q. B. D. 908.
(2) (1853) 4 D. M. & G. 769, 775. (4) [1896] 1 Ch. 409.

NEVILLE J. notice once given cannot be recalled. Under these articles one
1907 of the events on which a director vacates his office is resigna-
GLOSSOP tion. That event has happened, and the happening of the
v. event is made effectual, quoad the company, if the directors
GLOSSOP. pass a resolution, but, so far as the director is concerned, he has
— done his part and cannot withdraw without the consent of the
company. They are absolute masters to say whether or not
they shall accept his resignation. The six months are for the
benefit of the company. They might have reasons for suspend-
ing their acceptance until certain matters were arranged.
Therefore the withdrawal here was ineffectual. The event
happened and was made effective by the resolution.

Waggett, in reply.

NEVILLE J. This is a motion for a double purpose. The first is to restrain the company and the directors from interfering with the plaintiff's right to act as a director of the company. The second is to restrain them from interfering with his right to act as a managing director. With regard to the first point, it is now admitted that what has occurred has not determined his office as a director of the company, and, consequently, to that extent, the motion succeeds. Then the question that remains is whether the defendants were right in treating the plaintiff as having vacated his office as managing director in consequence of the written notice sent by him to the company requesting their acceptance of his resignation as managing director. That seems to me to depend entirely upon the proper construction to be put upon the articles of association of the company, and I think the most material articles are 84 and 85. I have no doubt that a director is entitled to relinquish his office at any time he pleases by proper notice to the company, and that his resignation depends upon his notice and is not dependent upon any acceptance by the company, because I do not think they are in a position to refuse acceptance. Consequently, it appears to me that a director, once having given in the proper quarter notice of his resignation of his office, is not entitled to withdraw that notice, but, if it is withdrawn, it must be by the consent of the company properly exercised by their

managers, who are the directors of the company. But, of course, that is always dependent upon any contract between the parties, and that has to be ascertained from the articles of association. Now here, in the first place, I think that article 85, which declares that "The office of managing director shall be vacated on the happening of any of the contingencies mentioned in clause 84 thereof, whereby the office of director shall be vacated," reads in the whole of article 84, including the proviso in the last paragraph. I have, therefore, to consider whether a managing director, giving notice to the company of resignation, is entitled to withdraw that notice prior to the passing of a resolution by the directors that the managing director has vacated his office. Such resolution has to be passed within six calendar months from the happening of the event whereby such director has vacated his office. Now what are the events whereby a director vacates his office? One of those events is "If by notice in writing to the company he resigns his office," and I think that, upon such notice, he has vacated his office, although by the proviso the effect of that vacation is not immediate, but is suspensory, and does not take effect until a resolution has been passed by the directors. It seems to me that that is a different matter from saying that the director cannot vacate his office until such a resolution has been passed. The distinction, no doubt, is a fine one, but it seems to me that if the construction contended for by the plaintiff had been intended by the articles, the words that would have been used would have been of this nature: "If by notice in writing to the company he resigns his office, *and such resignation be accepted*," instead of which the resignation of the office is made to be the vacation of the office, and the proviso is added to the effect that the directors may suspend the matter until they pass a resolution accepting his vacation. It seems to me, therefore, that the second part of this motion fails.

Solicitors: *Steavenson & Couldwell, for Stickney & Barton, Hull; Jaques & Co., for Watson, Son & Smith, Bradford.*

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[1906 C. 1693.]

June 3, 14. *Mortgage—Priority—Fictitious Sale by Trustee for Sale—Conveyance containing Receipt for Money never paid—Equitable Mortgagee without Notice—Prior Equity of Beneficiaries—Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 54, sub-s. 1; s. 55, sub-s. 1.*

A testator died in 1895, having by his will given his real estate to his son C., and one L., upon trust to sell, and divide the proceeds among his four children (including C.), each share being settled on trusts for a child for life, and afterwards for the children of that child. L. having died in August, 1904, from then till January, 1905, C. was the sole executor and trustee of the will. In September, 1904, C. and another severally owed money to one M. on promissory notes for 2000*l.* C. and M., in fraud of the rights of the beneficiaries under the will (M. having full notice of the breach of trust), arranged that the 2000*l.* should be further secured on part of the trust estate, and to carry out the arrangement C. on September 29, 1904, executed and delivered to M. what purported to be a conveyance on sale of part of the land held in trust to M. in consideration of 2000*l.* The deed contained the usual receipt for the purchase-money, but no part of the 2000*l.* was ever paid, it being arranged that the deed was to be held as security for the money due on the notes to the extent to which they should be dishonoured. In April, 1905, M. deposited the deed with B., and gave him a memorandum charging the land conveyed with 1000*l.* lent by B., who had no actual or constructive notice that any breach of trust had been committed, or that the 2000*l.* had not been paid by M., and had not been guilty of any conduct which would have made his equity inferior to that of the beneficiaries:—

Held, that there was no contract of sale, and therefore no vendor's lien, but an equity in the beneficiaries to have the property sold and the proceeds divided; that the beneficiaries were not estopped by the receipt from saying that the money had not been paid or that the real transaction was not a sale and purchase; and that, the equities of the beneficiaries and B. being equal in every other respect, the equity of the beneficiaries must prevail by reason of its priority in point of time.

Lloyd's Bank v. Bullock, [1896] 2 Ch. 192, distinguished.

JAMES CAPELL by his will, made in 1890, appointed his son James Partridge Capell and his son-in-law Joel Lean executors and trustees of the same, and devised to them certain lands in Weston-super-Mare, upon trust to sell them and invest the proceeds of sale, and, subject to an annuity (which had ceased to

be payable before the present action was commenced), to divide the trust premises and the income thereof equally among his four children, James Partridge Capell, Sarah H. Lean (the wife of Joel Lean), Ann Katherine Capell, and Georgina Herbert, the wife of Ernest Jones-Bateman, the share of each child being settled by the will upon trust to pay the income thereof to the child for life, and after his or her death to hold the capital for the children of such child as he or she should appoint, and in default of appointment equally, power being given to the trustees to postpone conversion so long as they should think fit.

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James Capell died in 1895, and the two executors proved his will in 1897.

Sarah H. Lean died in 1898, leaving four infant children, and without having executed her power of appointment.

Georgina H. Jones-Bateman had no issue at the time when the action was commenced.

J. P. Capell had one infant child.

Joel Lean died on August 4, 1904, and from that time until January 12, 1905 (when Ann Katherine Capell was appointed a new trustee in the place of Joel Lean), J. P. Capell was the sole trustee of the will.

In September, 1904, J. P. Capell and one Gray owed money to one Melsome on promissory notes amounting in the aggregate to 2000*l.*, and J. P. Capell and Melsome, in fraud (as his Lordship found) of the rights of the beneficiaries under the will, arranged that the moneys due to Melsome on the promissory notes should be further secured on part of the trust estate, and in order to carry out this arrangement J. P. Capell on September 29, 1904, executed an indenture conveying certain land at Weston-super-Mare (part of the trust estate) to Melsome. The deed purported to be a conveyance on a sale for 2000*l.*, and contained the usual receipt for the purchase-money.

It was, however, part of the arrangement that no purchase-money should actually be paid, but that the deed should be held as security for the money due on the promissory notes, and should only be used in the event of those notes not being honoured at maturity and to the extent to which they should not be so honoured.

PARKER J. Melsome (who had full notice of the breach of trust, and could
1907 not as against the beneficiaries under the will uphold the validity
CAPELL of the transaction) on April 18, 1905, deposited the deed with
v. Richard Bellis, and by a memorandum of deposit of that date
WINTER. charged the property to which the deed referred with payment
to Bellis of 1000*l.* and interest. Bellis had no actual or constructive notice of any breach of trust having been committed or of the 2000*l.* mentioned in the conveyance not having been paid.

Melsome was adjudicated a bankrupt in October, 1905, and Cuthbert Winter was appointed trustee in his bankruptcy. Pursuant to an order made in the bankruptcy, the property referred to in the conveyance was sold, and the proceeds of sale, amounting (after certain deductions had been made) to 1266*l.*, were paid into a bank to await the result of the present action.

In May, 1906, Ernest Jones-Bateman was appointed a new trustee in the place of J. P. Capell.

The present action was brought by Ann Katherine Capell, Ernest Jones-Bateman and his wife, and the infant children of Sarah H. Lean against Winter, J. P. Capell, R. Bellis, and the purchaser; and the question for the decision of the Court was whether the beneficiaries under the will or the defendant Bellis had, under the circumstances above stated, the better equity.

Only the plaintiffs and Bellis were represented at the trial, which took place on June 3, 1907.

Mark Romer, K.C., and *George Lawrence*, for the plaintiffs. If the transaction with Melsome had been a bona fide exercise of the trust for sale, the plaintiffs could not have established their claim as against Bellis: *Lloyd's Bank v. Bullock*. (1) That case is only cited to be distinguished. If the sale there had not been within the scope of the trustee's authority, the plaintiffs would not have been entitled to rely on the receipt in the deed, and could not have succeeded. The plaintiffs in the present case would have had a difficulty in their way if Bellis had obtained the legal estate; but here the opposing

(1) [1896] 2 Ch. 192.

claims are both equitable only, and the power of sale was never exercised. Capell was not when he conveyed acting within the scope of his authority, for there was no power under the will enabling him to mortgage the property, and he was moreover mortgaging to secure his own debt. There was a breach of trust, and the beneficiaries have the prior and the prevailing equity.

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Buckmaster, K.C., and *Christopher James*, for the defendant *Bellis*. No case is made against *Bellis* that he took his security through any lack of caution on his part. He had no actual or constructive notice that a breach of trust had been committed. He is an honest bona fide purchaser for value. The case is merely one of fraud by a trustee, and *Lloyd's Bank v. Bullock* (1) is not distinguishable. Capell executed a deed shewing that he was purporting to exercise the trust for sale which he undoubtedly possessed. What he purported to do would not, if really done, have been a breach of trust. In *Lloyd's Bank v. Bullock* (1) there was a breach of trust, the result of which was to enable the plaintiffs to obtain a security. There the breach of trust was the non-receipt of the purchase-money; here it was giving a security on the trust property. The fact that the breaches of trust in that case and this are different does not make any difference in the result. In either case the beneficiaries can only seek to enforce the lien for unpaid purchase-money. If Capell had sold to pay his private debt, that would have been just as much a breach of trust as giving a security for the same purpose. The "scope of the trustee's authority" means the professed and apparent scope of his authority. In *Lloyd's Bank v. Bullock* (1) the transaction was voidable as between the cestuis que trust and the trustee, but as against the equitable incumbrancer they were, as the cestuis que trust here are, bound by the trustee's act. *Bellis* is entitled, according to the principles laid down in *Perry Herrick v. Attwood* (2) and *Brocklesby v. Temperance Permanent Building Society* (3), to be paid the amount of his debt before the claim of the beneficiaries can be considered. The testator clothed the trustee with authority to do what he purported to do,

(1) [1896] 2 Ch. 192.

(2) (1857) 2 De G. & J. 21.

(3) [1895] A. C. 173.

PARKER J. and, as what was done was regular on the face of it, the cestuis que trust are bound by whatever would bind the trustee himself. The fact that Bellis has obtained possession of the conveyance gives him the better equity: *Rice v. Rice*. (1) The effect of the receipt in the body of the deed is, by ss. 54 and 55 of the Conveyancing and Law of Property Act, 1881, and s. 3 of the Conveyancing Act, 1882, the same as if Bellis had made all reasonable inquiries and had been told that the transaction was a proper exercise of the power of sale: *Worthington v. German*. (2) The trustee is estopped from denying that the money has been paid, and the cestuis que trust are in the same position.

[They also referred to *Shropshire Union Railways and Canal Co. v. Reg.* (3); and PARKER J. referred to *Walker v. Linom.* (4)]

Mark Romer, K.C., in reply. The effect of the argument on behalf of Bellis is that a purchaser for value without notice of a breach of trust, and also without a legal title, is to be preferred to a person with an equitable title which is prior in point of time. A purchaser for value without notice is only preferred, where the equities are equal, if he has also the legal estate. *Shropshire Union Railways and Canal Co. v. Reg.* (5) is really an authority in my favour, for there Lord Cairns L.C. says: "I conceive it to be clear and undoubted law, and law the enforcement of which is required for the safety of mankind, that, in order to take away any pre-existing equitable title, that which is relied upon for such a purpose must be shewn and proved by those upon whom the burden to shew and prove it lies, and that it must amount to something tangible and distinct, something which can have the grave and strong effect to accomplish the purpose for which it is said to have been produced." The prior right of the cestuis que trust cannot be taken away by the fact that the trustee signed a deed containing a receipt. *Lloyd's Bank v. Bullock* (6), *Rice v. Rice* (1), and *Worthington v. German* (2) were all cases as to a vendor's lien; but here there was no sale.

Cur. adv. vult.

(1) (1853) 2 Drew. 73.

(2) (1867) 16 W. R. 187.

(3) (1875) L. R. 7 H. L. 496.

(4) Since reported, ante, p. 104.

(5) L. R. 7 H. L. 507.

(6) [1896] 2 Ch. 192.

June 14. PARKER J. (after stating the facts). The question I have to decide is whether the beneficiaries under the will or the defendant Bellis have or has, under the circumstances, the better equity.

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It was, I think, admitted, and I will assume for the purposes of this judgment, that the defendant Bellis had no notice, actual or constructive, of any breach of trust having been committed, or of the 2000*l.* mentioned in the conveyance not having been paid, and was not guilty of any conduct which would make his equity inferior to the equity of the beneficiaries. Of course, if the two equities be otherwise equal, that of the beneficiaries, which is prior in point of time, must prevail; but the equity of the defendant Bellis was said to be the better equity for the following reason. It was contended that the equity of the beneficiaries was merely an equity to enforce their trustee's lien for unpaid purchase-money, and that, having regard to the decision of Chitty L.J. (then Chitty J.) in *Lloyd's Bank v. Bullock* (1), such right was postponed to the equitable mortgage of the defendant Bellis. I agree that if a vendor executes a conveyance containing a proper receipt for the purchase-money, and hands such conveyance to the purchaser, who subsequently deposits it with an equitable mortgagee without notice of any vendor's lien, the equity of such mortgagee may, by reason of his possession of the conveyance, be superior to the vendor's lien for unpaid purchase-money. This is the effect (having regard to ss. 54 and 55 of the Conveyancing Act, 1881) of the well-known decision of *Rice v. Rice* (2); and the case of *Lloyd's Bank v. Bullock* (1) decides that where the vendor is a trustee having a power of sale his cestuis que trust are, with regard to enforcing the vendor's lien, in no better position than the trustee himself. But in the present case the equity of the beneficiaries under the will is not, in my judgment, a right to enforce a vendor's lien. Such a lien arises only out of a contract of sale and purchase, and here there was no such contract, and, therefore, even as between Mr. J. P. Capell and Mr. Melsome, no such lien ever existed. The equity of the beneficiaries is to have the land sold and the proceeds distributed

(1) [1896] 2 Ch. 192.

(2) 2 Drew. 73.

PARKER J. according to the will. In this respect, therefore, the case before me differs from the case of *Lloyd's Bank v. Bullock* (1), in which the cestuis que trust were asserting the lien of the vendor trustee, who had entered into a real contract of sale and purchase.

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It was, however, suggested that the principle underlying *Rice v. Rice* (2) and *Lloyd's Bank v. Bullock* (1) is that a vendor who, since the Conveyancing Act, has given a receipt in the body of the deed of conveyance is estopped, as against a subsequent equitable estate acquired without notice, from saying that the purchase-money was not actually paid, and that a like estoppel would prevent him from setting up that the real transaction was not one of purchase and sale, and that the beneficiaries are in no better position. Something might, no doubt, be said for this view if the principle underlying the decision in *Rice v. Rice* (2) and *Lloyd's Bank v. Bullock* (1) really depended on estoppel, but in my judgment it does not. It is clear from the judgment in *Rice v. Rice* (2) that the Vice-Chancellor was considering solely which was the better equity, that of the vendor or that of the incumbrancer; and he decided that the incumbrancer had the better equity, because he was in possession of a title deed containing the proper indorsed receipt, and which did not therefore put him upon inquiry, whereas the conduct of the vendor in parting with such deed made it inequitable for him to rely on the priority of his lien in point of time. *Lloyd's Bank v. Bullock* (1) decides two further points—first, that since the Conveyancing Act the absence of an indorsed receipt, when there is a receipt in the body of the deed, does not put a purchaser upon inquiry as it would have done before the Act; and, secondly, that, if the vendor be a trustee with a power of sale, his cestuis que trust are in no better position with regard to enforcing a vendor's lien than the vendor himself. There is no trace of the decision having turned in any way on estoppel.

In my judgment, therefore, the case is not within the principle of *Lloyd's Bank v. Bullock* (1), and, being unable to find that the rival equities of the beneficiaries and the defendant Bellis are superior the one to the other in any respect other than by reason

(1) [1896] 2 Ch. 192.

(2) 2 Drew. 73.

of priority in point of time, I am obliged to let priority in point of time govern my decision; and I hold that the equity of the beneficiaries prevails.

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Solicitors for plaintiffs: *Meredith, Roberts & Mills, for Baker, James & Lillington, Weston-super-Mare.*

Solicitors for defendant Bellis: *Ford & Ford, for Wansbrough, Dickinson, Robinson & Tayler, Bristol.*

F. E.

ATTORNEY-GENERAL v. MATHIESON.

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[1906 A. 1017.]

July 22, 23,
31.

Charity—Endowment—Consent of Charity Commissioners—Voluntary Subscriptions—Mixed Charity—Foundation Deed—Implied Authority to settle Trusts—Investment in Land—Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), ss. 62, 66—Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 29.

Where a charity is supported by voluntary subscriptions and donations given for the general purposes of the charity, the individual or committee entrusted with the money must, in the absence of evidence to the contrary, be deemed to have implied authority for or on behalf of the donors to declare by deed the trusts to which the sums contributed are to be subject; this deed, until set aside or rectified by the Attorney-General, must be treated as decisive of the trusts which by the authority of the donors are to regulate the charity.

If, by reason of a deed of this character, it is no longer competent for the governing body to apply as income any real or personal property of the charity, that “investment” is not exempt from the jurisdiction of the Charity Commissioners.

A charity cannot be said to be “wholly maintained by voluntary contributions” if it has freehold premises used for the purposes of the charity, and the fact that this freehold produces no actual income is immaterial.

In re Clergy Orphan Corporation, [1894] 3 Ch. 145, explained and distinguished.

Decision of Kekewich J. reversed.

APPEAL from a decision of Kekewich J.

This was an action by the Attorney-General against the trustees of an indenture of September 28, 1885, which raised a question of construction under ss. 62 and 66 of the Charitable

C. A. Trusts Act, 1853, the point being whether the defendants could
1907 sell certain freehold land vested in them as trustees for the
ATTORNEY- “Mildmay Mission to the Jews” without the approval of the
GENERAL Charity Commissioners under s. 29 of the Charitable Trusts
v. Amendment Act, 1855.
MATHIESON.

The facts as to the foundation of the charity, and its method of management, both prior to and after the execution of the indenture of September 28, 1885, as given by the late Rev. John Wilkinson, its founder and first director, in his evidence in the Court below were shortly as follows:—

Mr. Wilkinson began his work in 1876. The mission was, and always had been, supported entirely by the voluntary contributions of those interested in the work, and had never had any endowment at all, except so far as the freehold and leasehold properties from time to time occupied by the mission for the purposes of its work might have constituted in law an endowment; the policy of the mission had always been to incur no debts and hoard no moneys, but (subject to providing necessary house room) to apply all contributions and donations as they came in in promoting and extending the immediate work of the mission. Before the execution of the trust deed of September 28, 1885, the property and funds of the mission were vested solely in Mr. Wilkinson, who carried on the work with the assistance and co-operation of other workers, but without any formal rules or regulations, and without any formal expression of the purposes for which the property and funds were so held. Mr. Wilkinson, however, was in the habit of publishing annual reports and accounts shewing the income of the mission, and how it had been applied. In 1885, the income and property of the mission having assumed considerable proportions, Mr. Wilkinson thought it right that there should be some formal declaration of trust, and the deed of September 28, 1885, was accordingly prepared on his instructions. The property comprised in this deed included a freehold house, Cromwell Lodge (the subject of the present action), and all other tangible property held on behalf of the mission, including all manner of medical and other consumable stores. The mission included at that time a medical mission home and dispensary at 5, Cannon Place, Whitechapel Road; a

general mission home and reading-room at 36, Welleclose Square, E.; a printing house and inquirers' home at 49, Newington Green, N.; a convalescent home in connection with the medical mission; and a home and school for Jewish children located at Cromwell Lodge, most of these premises being occupied under ordinary tenancy agreements at rack rents. Cromwell Lodge was acquired as follows: In April, 1884, a note was brought to Mr. Wilkinson by hand from a lady, saying that she wished to give him 1350*l.*; as no special object was named for the application of this money, he went to see the donor to consult with her as to the manner in which it should be spent, when he was told that the donor thought that the money might be spent in establishing a second convalescent home; but, on his pointing out to her that the provision of a home and school for children was a matter which he had more immediately at heart, the lady at once said, "Use it for that or any other way you like": 1231*l.* of this gift was accordingly applied in the purchase of the freehold of Cromwell Lodge, which was conveyed to Mr. Wilkinson in fee, without any declaration of trust, and the balance in equipping and carrying on the school and home.

Mr. Wilkinson's contention was that he might, consistently with the terms and spirit of the donation, have applied the whole of this 1350*l.* in aid of the current income of the mission, as the gift was an absolutely unconditional and unsolicited free will offering. In the annual account for the year 1884 this donation was entered as a "special gift for home for Jewish children."

By the trust deed of September 28, 1885, after reciting that the hereditaments and chattels therein described had been purchased by the said John Wilkinson "out of moneys voluntarily contributed by various persons for charitable purposes, viz., for the maintenance of the institution known as the Mildmay Mission to the Jews, and thereafter more particularly described," and that it was intended that the same should be used "as they have been hitherto used by the said John Wilkinson in carrying on the work of the said institution," Cromwell Lodge, a leasehold house in Langdon Park Road, N., and various chattels therein enumerated were conveyed and assigned to eight trustees (of whom Mr. Wilkinson was one) upon trust that the same should

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be occupied and used respectively for the purposes of the said Mildmay Mission to the Jews, the general or fundamental objects of which were more particularly described in the first part of the second schedule to be as follows: "To preach the Gospel of our Lord Jesus Christ to Jews in Great Britain and Ireland (and also in foreign parts if it is deemed desirable), employing in the prosecution of the work medical missions, convalescent homes, inquirers' homes, homes for destitute children, agencies for procuring employment and assisting emigration, night schools for children, sewing classes for women, and various kinds of organizations for ministering discriminately to the temporary needs of the Jews, and for promoting the salvation of their souls." The deed contained a full power, with the consent of the said John Wilkinson during his life, and after his death at the discretion of the trustees, to sell and dispose of all or any part of the hereditaments and premises thereby conveyed and assured freed and discharged from the trust and provisions therein contained, with a trust to invest the net proceeds in the purchase of other hereditaments, or of other personal effects to be held by them upon the trusts and purposes already declared concerning the hereditaments and premises thereby conveyed and assigned, or in the meantime to invest them or any moneys received by them under the provisions of the deed in certain named securities, and hold the income and the rents and profits in trust for the said mission in accordance with the rules for the time being thereof. It was also provided that, in order to dispense with the personal interference of the trustees in the ordinary management of the said mission, there should be a director or directors thereof, and that the said John Wilkinson should be the first director with power to appoint his successor. There was a power to raise money on mortgage, and power to vary or revoke the trusts thereby declared if considered expedient.

The mission was worked by Mr. Wilkinson after the execution of the deed in the same way as he had formerly carried it on.

In March, 1906, a more suitable site for the school and home having been acquired, the trustees proposed to sell Cromwell Lodge and apply the purchase-money in building on the new site,

and entered into a contract with a purchaser; but before the purchase was completed the Charity Commissioners intervened, and this action was commenced by the Attorney-General against the surviving trustees of the deed of September 28, 1885, claiming a declaration that the trustees were not entitled to sell without the consent of the Charity Commissioners.

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The propriety of the proposed sale was in no way questioned, but as a matter of principle it was contended that this was land which could not be sold except with the consent of the Charity Commissioners.

Kekewich J. on December 11, 1906, came to the conclusion that the trust deed of September 28, 1885, made no difference to Mr. Wilkinson's powers, and that he could have used the proceeds of sale of the land as income, had it been considered advisable so to do for the purposes of the mission, and therefore, following *In re Clergy Orphan Corporation* (1) and *In re Church Army* (2), he held that the jurisdiction of the Charity Commissioners did not extend to this land.

From this decision the Attorney-General appealed.

Before the appeal was heard Mr. Wilkinson died; no further evidence was therefore obtainable as to the exact terms on which the 1350*l.* was given and appropriated for the purchase of Cromwell Lodge, and the case was, after some discussion, argued and decided on the footing that this gift was free from any restrictions or conditions.

The question mainly turned on the construction of ss. 62 and 66 of the Charitable Trusts Act, 1853. (3)

(1) [1894] 3 Ch. 145.

(2) (1906) 75 L. J. (Ch.) 467.

(3) 16 & 17 Vict. c. 137. The material portions of the sections are as follows:—

Sect. 62: "This Act shall not extend to . . . any institution, establishment, or society for religious or other charitable purposes, or to the auxiliary or branch associations connected therewith, wholly maintained by voluntary contributions, or any book-selling or publishing

business carried on by or under the direction of any society wholly or partially exempted from this Act, so far as such business is or shall be carried on by means of voluntary contributions only, or the capital or stock of such business; and where any charity is maintained partly by voluntary subscriptions and partly by income arising from any endowment, the powers and provisions of the Act shall, with respect to such charity, extend and apply to the

C. A. *Sir J. Lawson Walton, A.-G., Vaughan Hawkins, and E.*
 1907 *Beaumont*, for the appellant. The property the trustees are
 ATTORNEY- now selling is clearly an "endowment" within the definition of
 GENERAL s. 66 of the Charitable Trusts Act, 1853, which, as interpreted
v. by *In re Clergy Orphan Corporation* (1), includes all property of
 MATHIESON. every description held in trust for a charity, and whether or not
 held upon trusts or conditions which render it lawful to apply the
 capital to the maintenance of the charity; the only question is
 whether it comes under any of the exceptions of s. 62 of the
 Charitable Trusts Act. This donation of 1350*l.* was invested in
 land for the benefit of the charity, and this land was conveyed by
 the deed of September, 1885, to trustees upon trust for the charity,
 and under that deed this land and buildings thereon became
 permanent endowment which the trustees were no longer able to

income from endowment only, to the exclusion of voluntary subscriptions, and the application thereof; and no donation or bequest unto or in trust for any such charity as last aforesaid, of which no special application or appropriation shall be directed or declared by the donor or testator, and which may legally be applied by the governing or managing body of such charity as income in aid of the voluntary subscriptions, shall be subject to the jurisdiction or control of the said board, or the powers or provisions of this Act; and no portion of any such donation or bequest as last aforesaid, or of any voluntary subscription, which is now or shall or may from time to time be set apart or appropriated and invested by the governing or managing body of the charity, for the purpose of being held and applied or expended for or to some defined and specific object or purpose connected with such charity, in pursuance of any rule or resolution made or adopted by the governing or managing body of such

charity, or of any donation or bequest in aid of any fund so set apart or appropriated for any such object or purpose as aforesaid, shall be subject to the jurisdiction or control of the said board or the powers or provisions of this Act;"

Sect. 66: "In the construction of this Act, except where the context or other provisions of the Act may require a different construction . . . the expression 'endowment' shall mean and include all lands and real estate whatsoever, of any tenure, and any charge thereon, or interest therein, and all stocks, funds, moneys, securities, investments, and personal estate whatsoever, which shall for the time being belong to or be held in trust for any charity, or for all or any of the objects or purposes thereof; and the expression 'land' shall extend to and include manors, messuages, buildings, tenements, and hereditaments, corporeal and incorporeal, of every tenure and description."

(1) [1894] 3 Ch. 145, 151.

treat as being income : *In re Stockport Ragged, Industrial and Reformatory Schools*. (1)

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[SIR GORELL BARNES, PRESIDENT. Do you say that a person in the position of Mr. Wilkinson, who has received subscriptions and donations for a charitable object, can constitute himself a donor by executing a deed of this kind to the effect that certain investments included therein shall be an endowment?]

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Yes; the contrary construction would make s. 66 illusory, for almost every endowment arises originally from a voluntary gift. Sect. 66 shews that the present state of the fund must be looked at, not its original form. To succeed, the respondents must shew that this donation is now legally applicable as income; unless they can do this they cannot claim the benefit of s. 62.

The present case is, on the facts, clearly distinguishable from *In re Clergy Orphan Corporation* (2) and *In re Church Army*. (3) The deed of September, 1885, is valid by reason of its having been made under the implied authority of the donor; the contention of the respondents involves the absurdity that this deed is void. The constitution of the charity did not become fixed in any definite lines until the execution of this deed, but since its execution the charity has been regulated by this deed, just as much as if there had been a scheme, and the trustees are now estopped from disputing its validity. The action of Mr. Wilkinson in 1885 was wholly different from that of a governing body of a charity already in being, like *In re Clergy Orphan Corporation* (2), and having its objects defined by a deed or charter. In 1885 Mr. Wilkinson by this deed put himself in loco fundatoris and settled the scheme of this charity, making this land a permanent endowment. It is none the less an endowment because it lasts only until revoked : *In re Sir Robert Peel's School at Tamworth* (4); *In re Gilchrist Educational Trust*. (5)

P. O. Lawrence, K.C., and *J. H. Stamp*, for the respondents. In determining this question it is most important to consider the origin of the money that went to purchase this land; it was

(1) [1898] 2 Ch. 687, 700.

(3) 75 L. J. (Ch.) 467.

(2) [1894] 3 Ch. 145.

(4) (1868) L. R. 3 Ch. 543.

(5) [1895] 1 Ch. 367.

C. A. money given to Mr. Wilkinson free from any direction for special
 1907 application or appropriation, which might have been applied as
 ATTORNEY- income for the general purposes of the mission. Mr. Wilkinson,
 GENERAL the founder and director of the charity, decided to apply it in
 v. the purchase of this land, and the land and house was conveyed
 MATHIESON. to him absolutely. He thought it expedient to invest the property
 acquired by the mission in the names of trustees, and for this
 purpose the deed of September, 1885, was executed, but it in
 no way changed the character of the charitable trust, or operated
 as the foundation of the charity. Before the execution of this
 deed Mr. Wilkinson, as sole trustee, was not subject to s. 29 of
 the Charitable Trusts Amendment Act, 1855, and the present
 trustees are in the same position, having regard to the language
 of s. 62 as interpreted by *In re Clergy Orphan Corporation*. (1)
 The deed was in no sense the origin of this charity. The whole
 charity was supported by voluntary subscriptions and donations,
 and had, and has, no endowment that produced income. This
 land and house are occupied for the purposes of the charity.
 Even if it was a "mixed" charity, then this donation was
 given without any "special application or appropriation"
 being directed. Mr. Wilkinson was in the position of a govern-
 ing body making an investment, as in *In re Clergy Orphan*
Corporation. (1)

In *In re Church Army* (2) donations were solicited and given
 for a special object, the building of new headquarters, and yet
 the Court held that the Charity Commissioners had no juris-
 diction, as the money could be used, just as this donation could
 be used, for the general purposes of the charity. So here the
 investment in land did not alter the original character of the fund
 invested. "Endowment" must mean income arising from some-
 thing else than voluntary subscriptions. This land and house
 yields no income; there is therefore no "endowment" if the
 word is construed strictly: *In re Stockport Ragged, Industrial and*
Reformatory Schools. (3) But the charity may have become a
 "mixed" charity the moment the donation was made, though
 the donation itself, not being appropriated, is not subject to the

(1) [1894] 3 Ch. 145.

(2) 75 L. J. (Ch.) 467.

(3) [1898] 2 Ch. 687, 697.

jurisdiction of the Commissioners. So long as there has been no endowment by some outside person, any investment of the funds of the charity by a governor or the trustees is exempted by s. 62.

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The deed of September, 1885, is in no sense the foundation of the charity, for it treats the property included in it as already the property of the charity, and merely furnishes additional safeguards for its safe keeping and management, continuing the existing charity on the same lines. There is also a power of revocation, under which everything included in the deed could have been sold and the proceeds applied for the general purposes of the mission. The deed, therefore, is in no sense a permanent endowment, and it is clear that it was not intended that this particular piece of land should be permanently devoted to the purposes of this mission. *In re Stockport Ragged, Industrial and Reformatory Schools* (1), so far as it is against our contention, is distinguishable, on the ground that the donor in that case had directed the application of the money with the intention of founding the school. In the present case no distinction is made between the freehold land and the chattels comprised in the deed; all is made over to the trustees, the primary trust being for the use of the mission. It was never intended that the character of the gifts should be changed; the only object was to interpose trustees to take care of the property.

Vaughan Hawkins, in reply. Trustees claiming under this deed cannot now deny that there is an endowment, and cannot bring themselves within the exemptions in s. 62. It is for the trustees to make out that they are within the exemption, and they have failed to do so. The authority to execute this deed must be derived either mediately or immediately from the donor, and the donor may by implication have committed this power to Mr. Wilkinson.

Percy Wheeler, for the purchaser.

Cur. adv. vult.

July 31. COZENS-HARDY M.R. read the following judgment:—
The question in this appeal is whether the trustees of the

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Mildmay Mission to the Jews can sell a freehold house in Stoke Newington without the approval of the Charity Commissioners, in accordance with the provisions of s. 29 of the Charitable Trusts Amendment Act, 1855. The trustees allege that they are not affected by that section, because of the exemptions contained in s. 62 of the Charitable Trusts Act, 1853, and Kekewich J. has so held. Against this decision the Attorney-General appeals. The title proposed to be made by the trustees is under a deed dated September 28, 1885. By that deed the freehold house was conveyed to trustees upon trust that the same should be occupied and used for the purposes of the Mildmay Mission to the Jews, the general or fundamental objects or purposes of which are more particularly described in the first part of the second schedule. These trusts are plainly charitable. A power of sale is given to the trustees, and the trustees are directed to invest the net proceeds of sale as capital. *Prima facie* the case falls within s. 29, and it rests upon the trustees to make good their claim to exemption under s. 62. They seek to do this as follows: The property was purchased by Mr. Wilkinson in 1884 out of money given to him by a lady, without any directions as to the particular charitable application of the fund. He decided to apply it to establish a home for Jewish children; but there was nothing in the terms of the gift which precluded him from applying the whole fund as income. Mr. Wilkinson was the founder and director of the mission, and was not hampered by the intervention of trustees in the mode in which he disposed of the large subscriptions received by him from the charitable public, and duly accounted for in his published reports. The house was conveyed to him absolutely, without any declaration of trust. He thought it expedient to invest the property acquired by the mission in the names of trustees, and for this purpose the deed of September 28, 1885, was executed; but it in no way changed the character of the charitable trust or operated as the foundation of a charity. Before the execution of the deed, Mr. Wilkinson, as sole trustee, was not subject to s. 29, and it is contended that the present trustees under the deed are in the same position, having regard to the language of s. 62 as explained by the judgment of this Court in *In re Clergy Orphan*

Corporation. (1) It is impossible to deny that there is great difficulty in understanding s. 62, which must be read in connection with s. 66. Nevertheless, with the aid of the light afforded by the judgment of this Court in *In re Clergy Orphan Corporation* (1), I think it may be asserted that, for the purposes of the present case, the following propositions are correct: In the first place, this house is an "endowment" within the meaning of s. 66, unless there is something to be found in s. 62 which takes it out of the operation of the Act. In the second place, no charity can claim the benefit of the particular clause which was construed in *In re Clergy Orphan Corporation* (1), and which is mainly relied upon by the trustees in the present case, unless it is a charity maintained partly by voluntary subscriptions, and partly by income arising from endowment. In other words, it must be what has been called a "mixed charity." In the third place, in the case of a mixed charity, a donation, which would otherwise be an endowment of which no special application or appropriation shall be directed or declared by the donor, and which may be legally applied as income in aid of voluntary subscriptions, is not subject to the Act. In the fourth place, so long as property, which may be applied as income, is invested, whether in real or personal property, so that it is still legally competent, to the governing body to convert the investment into money and apply the money as income, such investment will in like manner be exempt from the Act. In the fifth place, if, by reason of some subsequent transaction, it is no longer competent to the governing body to apply the investment as income, there is nothing in *In re Clergy Orphan Corporation* (1) which justifies the contention that the investment is exempt from the Act. It seems to me impossible to hold that an application which would involve a breach of trust, and might be restrained by the Court, in any way resembles the case of *In re Clergy Orphan Corporation* (1), where the powers of the corporation remained unaffected by anything subsequent to the investment. And, lastly, a charity cannot be said to be "wholly maintained by voluntary contributions," and therefore exempt from the Act, if it has

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freehold premises used for the purpose of the charity. If the above propositions are correct, I think the contention of the trustees cannot be supported. I assume in their favour that their charity is a mixed charity, though I doubt whether this assumption is justified. They do not, and cannot, challenge the validity of the trust deed under which they are acting, and it is plain that it would be a breach of trust to apply the proceeds of the sale of the house as income. Even if Mr. Wilkinson could originally have done this, they are now bound to treat the proceeds of sale as capital, and invest it accordingly. There is, moreover, a further difficulty in the way of the trustees. When money is given by charitable persons for somewhat indefinite purposes, a time comes when it is desirable, and indeed necessary, to prescribe accurately the terms of the charitable trust, and to prepare a scheme for that purpose. In the absence of evidence to the contrary, the individual or the committee entrusted with the money must be deemed to have implied authority for and on behalf of the donors to declare the trusts to which the sums contributed are to be subject. If the individual or the committee depart from the general objects of the original donors, any deed of trust thus transgressing reasonable limits might be set aside by proper proceedings instituted by the Attorney-General, or possibly by one of the donors. But unless and until set aside or rectified, such a deed must be treated as in all respects decisive of the trusts which, by the authority of the donors, are to regulate the charity. And it is irrelevant to urge that the donors did not originally give any express directions on the subject, or that it might have been competent to the individual or the committee to have dealt with the sums contributed as income. In this view the trust deed prepared and executed by Mr. Wilkinson is the only document which can be looked at, and s. 29 applies. Kekewich J. seems to have thought that the deed made no difference in the powers possessed by Mr. Wilkinson, and that, notwithstanding the deed, he could have used the proceeds of sale as income, and that, this being so, *In re Clergy Orphan Corporation* (1) applied. With great respect to

(1) [1894] 3 Ch. 145.

the learned judge, I am unable so to construe the deed, and I think the present case is not governed by *In re Clergy Orphan Corporation*. (1) I have thought it right to approach the consideration of the case on the assumption that the money was given to and accepted by Mr. Wilkinson for the purposes of the mission, but free from any restrictions or conditions. I doubt whether this is the true result of his evidence and of the statements in the report for 1884, in which it is treated as a "special gift for home for Jewish children." But as this point was not taken in the Court below, I prefer not to base my decision upon it. In my opinion the appeal must be allowed and a declaration be made in the terms of the writ.

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SIR GORELL BARNES, PRESIDENT. I am of the same opinion. I have been afforded by the Master of the Rolls the opportunity of reading his judgment in this case, and concur with him in holding that this appeal should be allowed and a declaration made in terms of the indorsement on the writ. The question is whether the trustees, in carrying out the sale of this land, are subject to the restrictions imposed by s. 29 of the Act of 1855, and this depends on whether they can bring themselves within the exemptions in s. 62 of the Act of 1853. The expression "endowment" is defined by s. 66 of the last-mentioned Act in terms which include the said land unless the aforesaid exemptions apply. The first exemption relied on was that which provides that the Act shall not extend to a charity wholly maintained by voluntary contributions; but this charity is not now wholly maintained by such contributions, for it has property under the deed of trust from which it derives benefit, and so far as this exemption is concerned it appears to be immaterial whether such property is producing actual income or not. The only other exemption upon which reliance was placed by the trustees is that which relates to a charity maintained partly by voluntary subscriptions and partly by income arising from any endowment. And even if the charity could be considered as coming within the description of such a mixed charity as that referred to in the exemption, yet by the terms of the deed of trust, which have been

(1) [1894] 3 Ch. 145.

C. A. . . . referred to by the Master of the Rolls, the property does not
 1907 . . . appear under the present trusts to be legally applicable as
 ATTORNEY- . . . income. In this respect the case differs from that of *In re*
 GENERAL . . . *Clergy Orphan Corporation* (1) cited to us, where the property was
 v. . . . considered to be merely a form of investment which could be
 MATHIESON. . . . applied by the corporation as they chose.
 The President.

KENNEDY L.J. I also have had an opportunity of reading the judgment of the Master of the Rolls, with which I entirely agree, and I have, therefore, nothing to add.

Solicitors: *The Treasury Solicitor; Marshall & Pridham; Crossfield, Cushing & Wheldon.*

W. C. D.

KEKEWICH
J.

In re BIRMINGHAM SMALL ARMS COMPANY'S
APPLICATION.

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June 25.

Trade Mark—Registration—Identical Mark for different Description of Goods—Discretion of Registrar—Associated Trade Marks—Assignment—Costs of Registrar—Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 12, sub-ss. 2, 3; ss. 22, 24, 27, 48.

A company which carried on several separate and distinct businesses registered the trade mark "B.S.A." in class 19 in respect of arms, ammunition, and stores. They subsequently applied to register the same trade mark in class 22 in respect of cycles, motor cycles, and automobiles. The registrar required them, as a condition of registration, to agree that the marks should be associated in accordance with the provisions of s. 24 of the Trade Marks Act, 1905.

On the applicants declining this condition, the registrar, in the exercise of his discretion under s. 12, sub-s. 2, of the Act, declined to register the mark.

On appeal from this decision:—

Held, that the discretion vested in the registrar was not an absolute discretion, but one to be exercised subject to the provisions of the Act. Sect. 24 was one of such provisions, and had nothing to do with the registration of identical trade marks, but of marks "so closely resembling a trade mark of the applicant already on the register for the same goods or description of goods as to be calculated to deceive or cause confusion if used by a person other than the applicant."

The two classes of goods in question were also not the "same goods

or description of goods," and the registrar must be directed to proceed with the registration of the mark in class 22 without the condition of association.

Held, further, that the applicants, although successful, must pay the costs of the registrar, who was a public official occupying a fiduciary position, and had done nothing to disentitle himself to costs.

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THIS was a motion on behalf of the Birmingham Small Arms Company, whose premises were situated at Armoury Road, Small Heath, near Birmingham, against a decision of the Registrar of Trade Marks refusing to register the applicants' trade mark "B.S.A.," No. 281,539.

The Birmingham Small Arms Company carried on at Birmingham several separate and distinct businesses grouped under four main headings—viz.: (1.) small arms, such as military and sporting rifles; (2.) component parts and fittings for bicycles; (3.) automobiles; and (4.) engineers' small tools and gauges. These businesses were carried on in different factory buildings, and under separate managers. The letters "B.S.A." (being the initials of the company's name) had been for many years universally recognized as indicating goods manufactured by the company in one or other of their businesses. On April 2, 1906, the company applied, in pursuance of the provisions of the Trade Marks Act, 1905, for the registration of the letters "B.S.A." as their trade mark in various classes, including 19 and 22. In class 19 the application was No. 281,536, and was in respect of arms, ammunition, and stores, not included in class 20. In class 22 the application was No. 281,539, and was in respect of cycles, motor cycles, and automobiles, included in this class. The remainder of the applications are not material for the present purpose.

The application No. 281,536 in respect of goods in class 19 was duly registered in March, 1907 (to date from April 2, 1906), the company having satisfied the registrar that the letters "B.S.A." were distinctive of their goods. With regard to the application No. 281,539 in respect of goods in class 22, the registrar required the company, as a condition of registration, to agree that the mark No. 281,539 should be associated with mark No. 281,536, in accordance with s. 24 of the Trade Marks Act, 1905. The company objected, on the ground that bicycles,

KEKEWICH motor cycles, and automobiles in class 22 were not "the same goods or description of goods" as arms, ammunition, and stores in class 19, and also pointed out that it was possible at some future date that they might wish to assign one or other of the businesses to a new company with the trade mark connected therewith, in which case difficulties would arise under s. 27 of the Act, under which associated trade marks were assignable or transmissible only as a whole and not separately.

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The registrar insisted upon his requirement, and, in his discretion, refused registration of the mark No. 281,539. The company thereupon applied to him, under s. 12, sub-s. 3, of the Act, to state in writing the grounds of his decision, and the materials used by him in arriving at the same. This statement was furnished on April 11, 1907, by the registrar, Mr. Ralph Griffin, and was in the following terms (omitting the preliminary statement of the facts relating to the two applications):—

"Now under s. 24 of the Act, where an application is made for identical marks they are to be associated, unless, if used by different firms, they would not cause confusion. If used by different persons the same mark is not to be registered for the same goods or description of goods. That introduces two elements for consideration—first, what are the same goods or description of goods; and, secondly, would the use by different persons cause confusion?

"I start here with a company which has been carrying on business for many years as the Birmingham Small Arms Company, Limited. It might be supposed at first sight, on reading its name, that that company's business was limited to small arms, which are registered in class 19; but, as all the world knows, that is not so. All the world knows that their business is also the supply of cycle parts, which have secured a very great reputation indeed. The applicants have used a mark consisting of a stand of arms with their name in full, but, as a matter of convenience, people talk of the applicants as the 'B.S.A.,' and the applicants have in fact used as a mark the stand of arms and the letters 'B.S.A.' I therefore have to deal with the case of a company who have been carrying on a business in arms, and also in cycles and parts thereof. It seems to me not unreasonable

to say that the public would regard, and I ought to regard KEKEWICH arms and cycles for this purpose and in this particular case as J.
the same description of goods, but whether that be so or not, 1907
there is always a discretion, as I understand it, which I have to BIRMINGHAM
exercise to prevent deception and confusion. Now, if I see a SMALL ARMS
quantity of goods stamped with the name 'The Birmingham COMPANY'S
Small Arms Co., Limited,' I should immediately assume that, APPLICA-
however various their kind, or however various their descrip- TION,
tion, they were all made by one and the same company, the In re.
company that I know well by reputation already. As I have
said, the letters 'B.S.A.' are short for the Birmingham Small
Arms Company, Limited, and it follows that if I see 'B.S.A.'
stamped on goods, however different, I at once assume they come
from the Birmingham Small Arms Company, Limited. It
follows from this that if they do not confusion and deception
immediately arise, and the case falls exactly within the decision
of a distinguished judge about the word 'Kodak' (*Eastman
Photographic Materials Co. v. John Griffiths Cycle Co. and Kodak
Cycle Co.*). (1)

"The case may be stated (and I need only shortly point it out) in another way by assuming an application by some person, not the applicants, to register the letters 'B.S.A.' Can it be doubted that whatever the goods were I should refuse to proceed on such an application ?

"An application in this particular case has been lodged to alter the specification of goods. I do not think it makes the slightest difference to the point I have raised, but it must not be taken that it has been assented to because the mark has already been advertised, and it is already more than a year since the application has been made.

"In the circumstances, as the applicants refuse to associate this mark with the mark already registered, as a matter of discretion I refuse to register it."

On May 3, 1907, the Birmingham Small Arms Company gave notice of motion before Kekewich J. that the Registrar of Trade Marks might be directed to proceed with the application for the registration of Trade Mark No. 281,539.

(1) (1898) 15 Rep. Pat. Cas. 105.

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P. O. Lawrence, K.C., A. J. Walter, K.C., and Sebastian, for the application. The Trade Marks Act, 1905, aims at preventing the registration of the same trade mark in respect of similar goods, but is not aimed at cases where the goods are absolutely distinct and cannot be confused. It is submitted that the discretion of the registrar must be exercised subject to the provisions of the Act. (1) Sect. 24 of the Act does not apply or refer to identical trade marks, and is inapplicable to the present case. It refers to the registration of a trade mark so closely resembling a trade mark of the applicant already on the register "for the same goods or description of goods" and so calculated to cause confusion. Here the goods in the two classes are quite different—small arms and cycle accessories. It is not enough to say that they are sold by the same firm. If the trade marks are associated, difficulties will arise in the event of the company desiring to assign one of their various businesses with the goodwill and the trade mark connected with it, since by s. 27 of the Act associated trade marks are to be assignable or transmissible only as a whole, and not separately. In his statement of reasons the registrar treated s. 24 as referring to applications for identical trade marks, but that is not so. He also considered

(1) 5 Edw. 7, c. 15, provides as follows:—

Sect. 12: "(1.) Any person claiming to be the proprietor of a trade mark who is desirous of registering the same must apply in writing to the registrar in the prescribed manner.

"(2.) Subject to the provisions of this Act the registrar may refuse such application, or may accept it absolutely or subject to conditions, amendments, or modifications.

"(3.) In case of any such refusal or conditional acceptance the registrar shall, if required by the applicant, state in writing the grounds of his decision and the materials used by him in arriving at the same, and such decision shall be subject to appeal to the Board of Trade or to

the Court at the option of the applicant."

Sect. 24: "If application be made for the registration of a trade mark so closely resembling a trade mark of the applicant already on the register for the same goods or description of goods as to be calculated to deceive or cause confusion if used by a person other than the applicant, the tribunal hearing the application may require as a condition of registration that such trade marks shall be entered on the register as associated trade marks."

Sect. 27: "Associated trade marks shall be assignable or transmissible only as a whole and not separately, but they shall for all other purposes be deemed to have been registered as separate trade marks. . . ."

that he ought to regard the two classes of goods, namely, small arms and cycle accessories, as of the "same description of goods," but that can scarcely be reasonably argued. The *Kodak Case* (1), to which reference was made, was a case of fraud, and does not bear upon the present. We submit, therefore, that the registrar was wrong in the view which he took, and that the direction requiring the trade mark to be associated would be injurious to the applicants, and ought not to be insisted upon.

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George Lawrence (Sir J. Lawson Walton, A.-G., with him), for the Registrar of Trade Marks. Under s. 12, sub-s. 2, of the Act the registrar has a discretion to refuse an application of this sort or to accept it absolutely or with conditions; that general discretion he has exercised in the present case, and it is not cut down by s. 24. That section contemplates confusion arising in the case of application for marks closely resembling one already on the register. The present is therefore an a fortiori case, because the marks are identical. It is an impossible construction to put upon the section to say that if there is a chance of deception or confusion you shall associate the marks, but if there is a practical certainty, as in the case of identical marks, you shall not. Such a case must have been intended to be covered by s. 24. The condition, therefore, imposed by the registrar must be upheld. Confusion would inevitably arise if the trade mark was sold with one branch of the business and retained in respect of another, and there is all the more reason to anticipate confusion in a case like the present, where the trade mark consists of the initials of the name of the company. No doubt the registrar made a slip in saying that s. 24 in terms referred to applications for identical marks; but his discretion has been properly exercised, and he is entitled to his costs, which are in the discretion of the Court under s. 48 of the Act.

KEKEWICH J. Questions of this character are always approached by me with a leaning in favour of the decision of the registrar, which I am called upon to review. In the first place, there is a

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discretion vested in the registrar which, although open to review, is nevertheless intended to be exercised by him, and is exercised by him, in a judicial manner, and which, therefore, ought not to be readily upset. But, besides that, when you come to questions, such as this, touching confusion, the registrar has necessarily a very much larger experience of what is confusion and what is not, and is continually hearing objections and answers to objections of that character, and one ought not to depart readily from his conclusion. But still it is my duty to consider the question as it is submitted to the Court; and I have less hesitation in differing from the registrar on the present occasion, because I am dealing with a new point arising on a new section in a modern and amending Act.

Let me first deal with sub-s. 2 of s. 12, and with the point which was made on behalf of the registrar respecting his discretion given by that section. It is said, and said, I think, rightly, that s. 24 does not cut down that discretion; but s. 24 must, in some way or other, interfere with the discretion, and to my mind it is sufficiently obvious to what extent it interferes with it. The sub-section says: "Subject to the provisions of this Act the registrar may refuse such application, or may accept it absolutely or subject to conditions, amendments, or modifications." It is not an absolute discretion vested in him to do as he pleases. Of course, he does not wish or intend to exercise it arbitrarily. He is not left to conclude from authority or practice what ought to be done, but he is to exercise his discretion "subject to the provisions of this Act." Sect. 24 deals with the question of refusing registration or admitting to registration on terms, and must be regarded as a provision subject to which the discretion is to be exercised. Though I agree that s. 24 does not cut down sub-s. 2 of s. 12, the two are to be read together, and the discretion vested in the registrar under sub-s. 2 must be exercised subject to the provisions of s. 24.

Before I pass to s. 24, let me deal with another point which, of course, is of very great practical importance in this case—that is, the effect of a trade mark being registered as associated with another. It has been pointed out to me that it is of the greatest

importance to the applicants that their trade marks should not be associated, because, according to the provisions of s. 27, they might be unable to assign in the future the goodwill of some part of their business by reason of the trade mark of that part of their business being associated with the trade mark of some other part of their business. If one thought there was any ambiguity about the provisions of s. 24, then one would have to go into the scheme of the Act so far as it bears on the point, and certainly into those sections which deal with associated trade marks, because the result of the application of s. 24 may be to provide that the trade marks shall be associated; but I do not think I ought to regard the consequences, large as they may be, of a condition imposed by the registrar in order to construe s. 24, under which restriction may be imposed, unless there is such ambiguity that I am driven to this conclusion, that one particular construction can hardly be maintained because of the disastrous or large consequences which would follow. Therefore I dismiss from my mind the inconvenience to the applicants which would arise from the associated trade marks, because, for reasons which I will mention presently, I do not think there is any ambiguity as regards the construction of s. 24; and therefore I am not at liberty to look into the consequences. I have had no argument here respecting the resemblance of one class of goods to the other, and it is not even suggested that there is a close resemblance between the classes of goods in respect of which the identical trade mark is proposed to be registered. It is asserted by the applicants that there is no close similarity between arms, ammunition, and stores, in respect of which this trade mark is on the register in class 19, and cycles, motor cycles and automobiles, in respect of which it is desired to place the same trade mark on the register in class 22. Simply applying my own knowledge of such things, I do not hesitate to say that these two classes of goods are of a different description, and there is no resemblance of one to the other.

With these preliminary observations I go straight to s. 24, and, to my mind, the section is one which it is not difficult to read. It deals only with those cases, as I understand it, where the application is made "for the registration of a trade mark so

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closely resembling another " that certain consequences are likely to arise. It does not deal with an application for the registration of identical trade marks. It is impossible really, to my mind, to conceive that the Legislature can have intended anything of that kind, or contemplated such an effect; but at any rate the words of the section are perfectly plain: "If application be made for the registration of a trade mark so closely resembling a trade mark of the applicant." That is the only application which is within the purview of the Legislature under that section. It has nothing to do with the registration of an identical trade mark. When that particular application is made, the registrar has to consider this: Is this such a trade mark as that, if applied for by a stranger, confusion would be likely to occur? The reference to "calculated to deceive or cause confusion" does not refer to every application for a trade mark, but to an application by a stranger; and the application by a stranger is only introduced hypothetically as an example by which the registrar is to be guided in concluding whether the registration is to be refused or not. The application which he is to consider is one for a trade mark "so closely resembling a trade mark of the applicant already on the register for the same goods or description of goods." So that again his search is limited. He is not only to look for a trade mark of the applicant's already on the register, but he is to look for one which is already on the register "for the same goods or description of goods." If I am right—and, having regard to the way in which the case is brought before the Court, it seems to me inconceivable that I am wrong—in saying that the two classes of goods with which we are here dealing are not the same goods or description of goods, then really the section does not apply. Application is made for the registration of, no doubt, an identical trade mark of the applicant, but it does not "closely resemble" it. A distinction is drawn between "identical with" and one which "closely resembles" some other trade mark already on the register. But, besides that, it is not on the register "for the same goods or description of goods," and to my mind it is impossible really to read this section carefully and apply it to the case which I have in hand. This is an application of an entirely different character

—an application by a person who has a trade mark on the register as regards goods in class 19, and who wishes to have that same trade mark registered as regards goods in class 22. Why should he not be at liberty to do that? Where is the possibility of confusion? As I understand, the registrar seems to have thought that because this particular trade mark “B.S.A.” has been already used as regards these goods, which apparently it has, therefore some confusion might hereafter arise. I am unable to follow his reasoning in that respect. I cannot conceive that any confusion can arise, but if it does it will not be that sort of confusion which is contemplated by s. 24. If I am right in my construction of that section, it does not come into this case at all, and is no answer to the application. All that the applicant says is, “Register the same trade mark as regards one class of goods which I have already registered for another class of goods.” There is not the slightest reason, as far as I know—and the registrar has not adduced any reason—why that should not be done. It seems to me, therefore, that the trade mark ought to be registered, and the registrar must be directed to proceed with the registration without the condition as to association.

[*P. O. Lawrence, K.C.*, having urged that the successful applicants should not be ordered to pay the costs of the registrar, and that s. 48 of the Act had introduced a new departure giving the Court absolute discretion to say whether the registrar should have his costs or not (*Sebastian on the Trade Marks Act of 1905*, p. 38), his Lordship proceeded :—]

It seems to me that although the registrar is not a trustee he is a public official, and is to be regarded in quite a different manner from any person other than a trustee. He is a person occupying, so to speak, a fiduciary position. The general rule of the Court with regard to persons in that position is that they are entitled to their costs so long as they do nothing to disentitle themselves to costs, and I think I ought to adopt that rule generally. This is a new question under a new Act, and although, in my view, the registrar has misconstrued s. 24, it is impossible to say that the point is not of great importance and one fully deserving judicial consideration. I think that in this case, where

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BIRMINGHAM Solicitors: *Sharpe, Parker, Pritchards, Barham & Lawford,*
SMALL ARMS for *Ryland, Martineau & Co., Birmingham; Solicitor to the Board*
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July 4, 10.

In re BUCKTON.
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[1906 B. 1879.]

Will—Construction—Gift to a Person for Life and then “to his Sons and their Sons in Succession”—Tenant in Tail—Rule in Shelley’s Case—Costs—Practice—Uniformity.

By his will G. B. devised a mansion-house and copyhold property to trustees upon trust to the use of his eldest son G. B. B., to permit him during his life to occupy the same or receive the rents arising therefrom, and after his decease to permit the eldest son of G. B. B. to occupy or receive the rents of the said estate during his life, “and then to his sons and their sons in succession,” and in default thereof to the second son of G. B. B. and his sons in succession, and in default to the third and other sons of G. B. B. and their sons in succession, according to the priority of their birth, and in case his eldest son G. B. B. should die without leaving any son or male descendant, then upon trust to hold the same estate to the use of the testator’s second son W. M. B. for life, with remainder to his eldest and other sons and their issue in succession, with remainders over.

The copyhold property was subsequently enfranchised and disentailed. The plaintiff W. W. B., as the eldest son of G. B. B., took out a summons, to which W. M. B. and the trustees of the wills of G. B. and G. B. B. were made respondents, asking for a declaration of his title to an estate in tail male in possession in the mansion-house and property, and that the costs of and incidental to the application might be provided for:—

Held, that upon the true construction of the will, and having regard to the rule in *Shelley’s Case*, (1579) 1 Rep. 93b, W. W. B. was entitled to an estate in tail male in possession of the property in question; and that, although in form it was a case of adverse litigation, yet in substance it was an amicable proceeding for the determination of a question for the benefit of all concerned, and therefore the costs of

all parties must be taxed as between solicitor and client, and come out of the estate. KEKEWICH J.

Statement of the practice with regard to costs in cases arising on adjourned summonses. 1907

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By his will, dated March 17, 1845, George Buckton, of Oakfield, in the parish and manor of Hornsey, Middlesex, gave, devised, and bequeathed his mansion-house, lands, hereditaments, and premises, called Oakfield, which were of copyhold tenure, unto his son George Bowdler Buckton, John Richards, and Edmund Heysham Wood, their heirs and assigns, and the heirs and assigns of the survivor, "upon trust to the use of my said eldest son George Bowdler Buckton, to permit and suffer him during his natural life to occupy the same or receive the rents issues and profits arising therefrom (thereout paying all quit rents and other charges to which such estate is subject) to and for his own use and benefit, and from and after his decease to permit and suffer the eldest son of my said son George Bowdler Buckton (should he have a son) to occupy or receive the rents issues and profits of the said estate to and for his own use (subject as aforesaid) during the term of his natural life, and then to his sons and their sons in succession, and in default thereof, then to the second son of my said eldest son George Bowdler Buckton and his sons in succession, and in default thereof then to the third and other sons of my said son George Bowdler Buckton and their sons in succession according to the priority of their birth, and in case my said eldest son George Bowdler Buckton should happen to die without leaving any son or male descendant of a son who shall live to succeed to the said estates, then upon trust that my said trustees and their heirs and assigns and the heirs and assigns of the survivor of them shall hold the same mansion-house lands tenements, hereditaments and premises and appurtenances to the use of my second son Woodyer Merricks Buckton, and permit and suffer him during the term of his natural life to use, occupy, and enjoy, or receive the rents issues and profits of the same to and for his own use and benefit (subject to the deductions aforesaid) and from and after his decease, for the use and benefit of his eldest and other sons and their issue in succession as aforesaid as expressed in relation to

KEKEWICH the issue of my eldest son, and in default of issue male of my
 J. second son Woodyer Merricks, then in trust for my eldest
 1907 daughter Elizabeth Merricks Buckton for her life and her issue
 BUCKTON, male at her decease." Then followed limitations to other
In re. daughters in succession, and their issue male, framed in like
 BUCKTON manner; and the testator gave the rest, residue, and remainder
v. of his real and personal estate to his trustees upon trusts for sale
 BUCKTON. and conversion, with a gift of the ultimate residue upon trust
 — that the trustees should pay one equal moiety thereof to George
 Bowdler Buckton, and the remaining moiety to Woodyer Merricks
 Buckton; and he appointed the same three persons who were
 trustees to be also executors of his will.

The testator died on February 11, 1847, and his will was duly
 proved on March 15, 1847. George Bowdler Buckton received
 the rents and profits of the Oakfield estate from the date of the
 death of the testator down to his own death on September 25,
 1905. The plaintiff William Woodyer Buckton was the eldest
 and only surviving son of George Bowdler Buckton.

The defendants Mary Ann Buckton, George Buckton Anderson,
 and William Borrer were the present executors and trustees of
 the will of George Bowdler Buckton, dated September 16, 1887.
 William Borrer was also the sole surviving trustee of the will of
 the original testator, George Buckton. The Oakfield estate
 remained copyhold until 1875, when it was enfranchised by
 G. B. Buckton.

By an indenture of disentail dated March 21, 1896, G. B.
 Buckton and the plaintiff purported to disentail and resettle the
 said estate. By another indenture of disentail dated November 1,
 1905, between the plaintiff and Frederick Herbert Ramsden, the
 plaintiff assured the Oakfield estate to the use of himself in fee
 simple.

On May 17, 1906, William Woodyer Buckton took out an
 originating summons against those claiming the residuary estate
 of the testator and the sole trustee of the testator's will, asking
 that it might be declared, upon the true construction of the will
 of George Buckton, that the plaintiff W. W. Buckton became
 entitled, upon the death of the testator's son George Bowdler
 Buckton, to an estate in tail male in possession in the

mansion-house, lands, hereditaments, and premises called Oak- KEKEWICH
field devised by the said will ; and that the costs of and incidental J.
to the application might be provided for. 1907

On the same May 17, 1906, the applicant's solicitors, Messrs. BUCKTON,
Ramsden & Co., wrote to Messrs. S. W. Johnson & Son, the *In re.*
solicitors for the respondents other than the trustees, stating that BUCKTON
the summons was taken out, not because Mr. W. W. Buckton *v.*
entertained much doubt as to the interest which he took in the BUCKTON.
Oakfield estate, but because it was desirable to remove any
possible objection to his title in future dealings with any part of
the estate. It appeared that Woodyer Merricks Buckton was a
lunatic, and Messrs. S. W. Johnson & Son had to obtain the
approval of the Master in lunacy to accept service and enter an
appearance on behalf of the committee of the lunatic's estate so
as to defend the action.

By an order of Kekewich, J. dated December 5, 1906,
it was referred to a special referee to inquire and report whether
any and what custom to entail existed in the manor of Hornsey,
and, if any such custom existed, in what manner such estate
tail descended, and generally what was the customary mode of
descent of lands held of that manor. The referee reported that
a custom existed in the said manor to entail copyholds either in
tail general or in tail male, and that an estate tail in the manor
descended according to the custom in the nature of gavelkind
(which was the customary mode of descent of lands held of the
said manor)—that was to say, in the case of an estate in tail
general, to all the sons of the tenant in tail on the rolls, and if
no sons, then to all his daughters, and in either case as co-
parceners in tail.

Jessel, K.C., and *Ashworth James*, for the plaintiff. The
referee has found a custom to entail in the manor, and this
property has been resettled, and the entail has been barred.
According to the rule in *Shelley's Case* (1), which applies here,
there is a devise to the plaintiff of an estate tail in remainder
expectant on the determination of the previous life estate given
to George Bowdler Buckton. *Van Grutten v. Foxwell* (2) is an

(1) 1 Rep. 93b.

(2) [1897] A. C. 658.

KEKEWICH authority in our favour, and at p. 667 Lord Macnaghten states the rule in *Shelley's Case*. (1) The case of *Mellish v. Mellish* (2) shews that the word "sons" in the present case will be equivalent to the word "heirs." The cases of *Doe v. Garrod* (3) and *Andrew v. Andrew* (4) support the view that the eldest son of George Buckton takes an estate in tail under the rule in *Shelley's Case* (1), and if that is inapplicable, then he takes it under the doctrine of *cy-près*.

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P. O. Lawrence, K.C., and *Austen-Cartmell*, for Woodyer Merricks Buckton. The plaintiff only takes an estate for life in this property, and on his death it falls into the residuary gift, under which the two sons take equally. The words in the will, after the gift of the life estate to G. B. Buckton, are "to his sons and their sons in succession"; that means to the sons in priority of birth, and not to sons as a class. The testator does not contemplate a class at all; he contemplates one son being in possession. The doctrine of *cy-près* is never to be applied so as to divest the estate given by express words. The testator has given an estate in words inapplicable to land in gavelkind. He intended the sons to take in succession, which is contrary to the custom of the manor, under which they would all take equally. The Court will not apply the principle of *cy-près* to give him an estate tail in gavelkind. The plaintiff can only get an estate tail by the application of the rule in *Shelley's Case* (1), and that is inapplicable here: *Archer's Case*. (5)

C. V. Rawlence, for the executors of the deceased son George Bowdler Buckton.

The defendant William Borrer did not appear by counsel.

Jessel, K.C., in reply, referred to *Doe v. Harvey*. (6)

Cur. adv. vult.

July 4. KEKEWICH J. The question for decision is what is the proper construction and effect of a few lines in the will of George Buckton, dated March 17, 1845. The passage which may with propriety and without risk be isolated from the rest of the will

(1) 1 Rep. 93b.

(2) (1824) 2 B. & C. 520.

(3) (1831) 2 B. & Ad. 87.

(4) (1875) 1 Ch. D. 410.

(5) (1597) 1 Rep. 66b.

(6) (1825) 4 B. & C. 610.

occurs in a devise of copyholds which, according to the custom of the manor, are capable of being entailed, and, omitting immaterial words, runs as follows. [His Lordship read the material parts of the devise, and continued :—]

The question what is the construction and effect of this devise was treated in argument as almost purely one of law—that is to say, the construction was treated as depending less on the grammatical meaning of the language than on the effect which the law attributes to that language. Nevertheless, it is of course necessary to examine and understand the meaning of the language employed, and to ascertain whether the testator has thereby afforded any guide to a conclusion respecting the proper application of rules of law. I am satisfied that in using the words quoted below Lord Herschell never proposed to exclude this duty, which in point of time as well as of logic must first be discharged by any Court undertaking to expound a written instrument. To my mind the most important words from this point of view are, “in default thereof.” What is intended by “thereof”? The testator has given an estate for life to the eldest son of his son George Bowdler Buckton, and on his death has given the property to his sons and their sons in succession. It is in default of persons capable of taking under this limitation that he has given the property to the second son of George Bowdler Buckton, who therefore can only become entitled on the failure of sons of the eldest son of George Bowdler Buckton and their sons. In other words, so long as there is existing issue male of the eldest son of George Bowdler Buckton, the second son of George Bowdler Buckton and his issue can take nothing.

This construction of the testator's language, reasonably plain in itself, is confirmed by the language afterwards employed in limiting estates to the next successors in title, which, with a variation which I think immaterial, is really the same as that before employed; and it is further confirmed by all the subsequent limitations, including the ultimate gift to the daughter Elizabeth, which depends on George Bowdler Buckton dying without leaving any son, or male descendant of a son, who should live to succeed to the estate, and is expressly made in favour of that daughter “for her life and her issue at her decease.”

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The meaning and effect of the testator's language, treated merely as language, having been thus ascertained, it remains to consider what is the legal interpretation of it. The plaintiff, who is the eldest son of the testator's eldest son, contends that according to the rule in *Shelley's Case* (1) there is devised to him an estate in tail in remainder expectant on the determination of the estate for life limited to his father George Bowdler Buckton, and the real question is whether this contention is well founded. Several cases were cited in argument, and it would have been easy to add to them without incurring risk of irrelevancy or prolixity, but in truth for the present purpose, and having regard to the language of this particular will, it is unnecessary to go beyond the one authority of *Van Grutten v. Foxwell*. (2) The facts of that case need not be stated, because its value for us is to be found in the general statements of the law respecting the rule in *Shelley's Case* (1) and of its proper application which are to be found in the speeches addressed to the House, and especially in that of Lord Macnaghten.

For a statement of the rule in *Shelley's Case* (1), which Lord Herschell on p. 662 says cannot be regarded as a mere rule of construction designed to carry out the intentions of the testator, but is a rule of law, I will content myself with referring to that in Coke's report quoted by Lord Macnaghten on p. 667; but there are a few lines on the following page which, though intended to be, and being no doubt in fact, merely a summary of the doctrine to be extracted from many other authorities, must be here set forth. Lord Macnaghten says (3): "It is hardly necessary to observe that any expression which imports the whole succession of inheritable blood has the same effect in bringing the rule into operation as the word 'heirs.'" With this language before me, and bearing in mind the meaning of the will apart from the application of the rule of law, I do not think it necessary to pursue the question further. In the phrase "his sons and their sons in succession" the testator has, in my judgment, imported the whole succession of inheritable blood in the male line, and, if that be so, it follows that the rule of law

(1) 1 Rep. 93b.

(2) [1897] A. C. 658.

(3) [1897] A. C. 668.

can be, and ought to be, applied. Whether it be material or not, this observation may be made, that the rule of law as thus applied gives effect to the expressed intention of the testator above expounded.

I therefore hold that the plaintiff's contention is well founded and must prevail.

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On the question of how the costs of the summons should be borne,

Jessel, K.C., and *Ashworth James*, for the plaintiff. We ask that the defendant may be ordered to pay the costs of the action. The action is brought by the plaintiff, who is entitled to the land, against the defendant, who denied that the plaintiff was so entitled and who resisted the claim. It is an action concerning the title to land, and the rule is that the unsuccessful party pays the costs. It cannot be right for the defendant to come here and claim the plaintiff's estate at the plaintiff's expense.

P. O. Lawrence, K.C., and *Austen-Cartmell*, for the defendant *W. M. Buckton*. This summons asks for a declaration as to the true construction of the will, and that the costs of and incidental to the application may be provided for. That is in the form of a trustees' summons taken out by arrangement with the trustees, and there was no indication that it was to be made a hostile summons. It asks who are the persons entitled, and on that footing the question was argued on behalf of the defendant remainderman. The summons is intituled *In the matter of the trust estate*. The view we adopt is thoroughly justified by the terms of the letter of May 17, 1906. Even if this defendant has to pay his own costs, he ought not to pay the plaintiff's costs.

Jessel, K.C., in reply.

Cur. adv. vult.

July 10. KEKEWICH J. Uniformity in practice is of the highest importance, and it is especially important in that department of practice which is concerned with costs. On the other hand, costs are so largely in the discretion of the judge that it is more difficult to secure uniformity in that department than in any other, and it is well nigh impossible to lay down any general

KEKEWICH J. rules which can be depended on to meet the ever varying circumstances of particular cases. But when an opportunity occurs, it is well to enunciate rules for the guidance of the profession, and a question arising in this case affords an opportunity which I think it right not to neglect.

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In a large proportion of the summonses adjourned into Court for argument the applicants are trustees of a will or settlement who ask the Court to construe the instrument of trust for their guidance, and in order to ascertain the interests of the beneficiaries, or else ask to have some question determined which has arisen in the administration of the trusts. In cases of this character I regard the costs of all parties as necessarily incurred for the benefit of the estate, and direct them to be taxed as between solicitor and client and paid out of the estate. It is, of course, possible that trustees may come to the Court without due cause. A question of construction or of administration may be too clear for argument, or it may be the duty of trustees to inform a claimant that they must administer their trust on the footing that his claim is unfounded, and leave him to take whatever course he thinks fit. But, although I have thought it necessary sometimes to caution timid trustees against making applications which might with propriety be avoided, I act on the principle that trustees are entitled to the fullest possible protection which the Court can give them, and that I must give them credit for not applying to the Court except under advice which, though it may appear to me unsound, must not be readily treated as unwise. I cannot remember any case in which I have refused to deal with the costs of an application by trustees in the manner above mentioned.

There is a second class of cases differing in form, but not in substance, from the first. In these cases it is admitted on all hands, or it is apparent from the proceedings, that although the application is made, not by trustees (who are respondents), but by some of the beneficiaries, yet it is made by reason of some difficulty of construction, or administration, which would have justified an application by the trustees, and it is not made by them only because, for some reason or other, a different course has been deemed more convenient. To cases of this class I extend

the operation of the same rule as is observed in cases of the first class. The application is necessary for the administration of the trust, and the costs of all parties are necessarily incurred for the benefit of the estate regarded as a whole.

There is yet a third class of cases differing in form and substance from the first, and in substance, though not in form, from the second. In this class the application is made by a beneficiary who makes a claim adverse to other beneficiaries, and really takes advantage of the convenient procedure by originating summons to get a question determined which, but for this procedure, would be the subject of an action commenced by writ, and would strictly fall within the description of litigation. It is often difficult to discriminate between cases of the second and third classes, but when once convinced that I am determining rights between adverse litigants I apply the rule which ought, I think, to be rigidly enforced in adverse litigation, and order the unsuccessful party to pay the costs. Whether he ought to be ordered to pay the costs of the trustees, who are, of course, respondents, or not, is sometimes open to question, but with this possible exception the unsuccessful party bears the costs of all whom he has brought before the Court.

This case does not fall within the first class, the application not being made by the trustees, but the question is whether it falls within the second or third class. Without hearing the question argued, I was disposed to think it fell within the third. It is an application by a man who, being undoubtedly entitled to possession of copyholds as equitable tenant for life under a will, claims to be, according to the proper construction and effect of that will, tenant in tail. He necessarily makes the trustees respondents, but they take no part in the argument, and his real opponents are those who would be entitled to the property in remainder, if his claim is ill founded, but who may be cut out altogether if he is tenant in tail. This looks much like hostile litigation, and scarcely less so because the summons asks that the costs "may be provided for," instead of asking, as would have been the better form if that had been intended, that the adverse litigants might be ordered to pay the costs. The applicant could not have brought ejectment, and the analogy to an action

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KEKEWICH for ejectment is not perhaps a close one; but the applicant
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claims the property as his, and contends that the respondents have no interest therein. There was no occasion, except for the applicant's convenience, that the question should be decided at the present time, and it could not possibly have been raised now by anyone but himself; but the determination of the question is of the greatest importance to him. This points to the application being made rather for convenience than by way of hostile litigation, and that view is strengthened by the letter of May 17, 1906, addressed by the applicant's solicitors to those acting for the respondents other than the trustees, who are represented by the same solicitors as the applicant. In that letter the applicant's solicitors state that he has issued the originating summons, not because he entertains much doubt as to the interest which he takes in the property, but because, owing to the unusual manner in which the limitations of the estate in the will are framed, it is desirable to remove any possible objection to his title which might be made in the future on dealing with any part of the property. The respondents were obliged to obtain the directions of the Master in Lunacy before accepting service and undertaking to appear. But, having obtained these directions, they did appear, and instructed counsel to oppose the application of course, but yet, by assisting the Court they enabled the applicant to attain his avowed object of obtaining a decision on the will and removing any possible objection to his title. Thus regarded the case does not strictly fall within either of the classes above mentioned, and yet it may fairly be treated as being of the character of the second class. The trustees did not ask for, because they did not require, any direction at the present time; but if the applicant is right, as I have held him to be, he can at any moment call on them to deal with the property according to his directions as absolute owner, and thus the rights of the parties and the duties of the trustees have been finally settled. It is in form adverse litigation, but in substance it is amicable procedure for determining speedily and inexpensively a question the solution of which must sooner or later be found for the benefit of all concerned, including the trustees.

Under these circumstances I hold that the costs of all parties,

to be taxed as between solicitor and client, must come out of the estate. There is no money out of which they can be paid, but I suppose it will be sufficient to declare the right and to leave the ways and means to be settled by the parties.

Solicitors: *Ramsden & Co.; S. W. Johnson & Son.*

G. M.

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In re EARL OF DUNRAVEN'S SETTLED ESTATES. KEKEWICH

[1906 D. 850.]

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Settled Land—Capital Money—Improvements—Irish Estates—Principal Mansion-house—Water Supply—Extinguishment of Fire—Fire Hydrants and Hose—Rebuilding Garden Walls—"Inclosing"—Laundry—Rebuilding Mansion-house—Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 25, sub-s. (vi.), (xiii.), (xx.)—Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 13, sub-s. (iv.); s. 15. July 11.

Upon the application of the tenant for life of settled land under s. 15 of the Settled Land Act, 1890, the Court authorized the application of capital moneys in payment of the cost—

(1.) Of the installation of a new water supply system in the principal mansion-house on the Irish estates, comprising also a complete equipment for extinguishing fire, including fire hydrants, hose, and other necessary fittings and apparatus, as being an improvement coming within s. 25, sub-s. (xiii.), of the Settled Land Act, 1882; and

(2.) Of rebuilding the walls of the garden attached to the same mansion-house, the old ruinous walls having been taken down and new walls inclosing more garden ground having been built in part on the site of the old walls, as being an improvement coming within the term, "inclosing" in s. 25, sub-s. (vi.).

The application for the sanction of the Court under s. 13, sub-s. (iv.), of the Settled Land Act, 1890, to the payment out of capital moneys of the cost of the proposed rebuilding of a laundry, 250 yards away from the mansion-house, refused.

Sub-s. (xx.) of s. 25 of the Settled Land Act, 1882, in authorizing as an improvement the "reconstruction, enlargement, or improvement of any of those works," refers to any of the works previously mentioned in the section, however and whenever made, and does not merely refer to works already constructed under powers given by the Act.

ADJOURNED SUMMONS.

This was an application by Windham Thomas, Earl of Dunraven, the tenant for life of certain settled land in the counties of Limerick

KEKEWICH and Glamorgan, that the respondents, the trustees of the settlement, might be directed to apply out of capital moneys in their hands the following (amongst other) sums, namely, the sum of 5746*l.* 7*s.* 5*d.* in payment of the cost of a new water supply to the mansion-house known as Adare Manor, on the Irish estates, and the sum of 597*l.* 8*s.* 1*d.* in payment of the cost of rebuilding walls of the garden attached to the mansion-house, notwithstanding that schemes were not, before the execution of the improvements in question, submitted for approval to the trustees or to the Court; and also that it might be determined that certain works mentioned in a scheme already submitted for the approval of the trustees pursuant to the Settled Land Acts, 1882 to 1890, for the erection of a new laundry were improvements within the meaning of the said Acts.

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The applicant was legal tenant for life in possession of the settled lands, the respondent Windham Henry Wyndham-Quin was tenant for life in remainder, and the infant respondents were successively tenants in tail male in remainder.

It appeared that the old water supply system of the mansion-house was antiquated in form, wholly inadequate in character, and during the summer months practically useless. The new system consisted of a complete high and low pressure water supply installation, and comprised also a complete equipment for extinguishing fire with duplicate water supplies from high and low level tanks. This latter equipment included, at a cost of 450*l.*, fire hydrants with branch pipes and connections, hand pipes and nozzles, many 100-foot lengths of fire-hose, hose boards with gun-metal brackets, carriers and forks, and other fittings necessary to connect the water and fire scheme to the battery and power house.

The walls of the garden attached to the mansion-house remaining standing after a great storm which occurred in January, 1903, were so strained, cracked, and shaken as to be dangerous, and, being built of common brick, were impossible to repair and had to be taken down and entirely rebuilt. The new walls were not all built on the site of the old walls, but were extended so as to include more land and enlarge the garden.

The old laundry, situated about 250 yards away from the

mansion-house, had to be pulled down owing to its ruinous condition, being completely past repair, and it was proposed to build the new laundry adjoining the stables, which were also 250 yards away from the mansion-house.

Objection having been taken on behalf of the remaindermen to the items above-mentioned and to the payment for the same out of capital moneys, the question whether they should be allowed or not now came before the Court for consideration.

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P. O. Lawrence, K.C., and *Gurdon*, for the tenant for life. It is admitted that the supply of water for domestic purposes comes under sub-s. (xiii.) of s. 25 of the Settled Land Act, 1882, and the only question under this head is whether the expenditure upon the apparatus for extinguishing fire can be allowed. We submit that it is covered by the words "other works and machinery for the supply and distribution of water for . . . other purposes, or for . . . other consumption."

We ask that the expenditure on the new garden walls may be allowed under either sub-s. (vi.) as being a permanent inclosure, or else under the term "fencing" in sub-s. (xviii.). This is a different case from *In re Duke of Marlborough's Settlement* (1), because that was a case of repairs, whereas here the old walls were taken down and new walls were built inclosing further ground, so that the site of the walls has in some parts been shifted to a considerable extent. There is no reason why sub-s. (vi.) should be limited to agricultural as distinct from demesne land.

The application relating to the expenditure on the laundry is based upon sub-s. (iv.) of s. 13 of the Settled Land Act, 1890, and the judgments of the Court of Appeal in *In re Lord Gerard's Settled Estate*. (2) We submit that the laundry is really part of the principal mansion-house, just as it was said in that case that stables might form part of the mansion-house.

Adams, for the remaindermen. Even assuming that a supply of water for the extinguishment of fire is within sub-s. (xiii.), I submit that the supply of movable apparatus, such as hydrants and hose, are not within the sub-section, but that it only contemplates works in the nature of fixtures, and not articles used for

(1) (1892) 8 Times L. R. 201. (2) [1893] 3 Ch. 252, 260, 261, 265, 268.

KEKEWICH temporary purposes. The works ought to form part of the soil.

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In the commencement of s. 25 the words "in connection with" the settled land mean, I submit, physically connected with it.

Further, "other works and machinery" means other works and machinery ejusdem generis with the foregoing and of a like fixed and permanent nature. Detachable chattels requiring from their very nature constant renewal are not sanctioned by s. 25.

With regard to the garden walls, I submit that sub-s. (vi.) is concerned with the inclosing of fields, and not gardens, and with the straightening of fences in fields. Walls of this nature are not within the section.

In *In re Verney's Settled Estates* (1) new fences put up partly in place of old fences rotten with age, and partly to divide the park for grazing purposes, were allowed, but those were fences clearly for the purpose of inclosing, and were not garden walls. *In re Duke of Marlborough's Settlement* (2) is the only case dealing with walls, and in that case the application was made under sub-ss. (xi.) and (xx.), and the expenditure was disallowed. In sub-s. (xviii.) "fencing" is mentioned, but only where it is necessary or proper in connection with any of the objects before mentioned.

George Lawrence, for the trustees.

KEKEWICH J. I think that the way in which to test the first question raised is to suppose a mansion-house sufficiently supplied with water for ordinary domestic purposes, so that under that head there would be no justification for an expenditure of capital moneys, and to suppose also that that water supply, although sufficient for those purposes, is utterly insufficient for extinguishing fire and preserving the mansion-house from damage by fire, and that, if occasion were to arise, there would be no means ready to hand for the extinguishment of fire when the fire-engines of the neighbouring town arrived—in those circumstances, would it be right under the powers conferred by s. 25 of the Settled Land Act, 1882, to sanction the expenditure of capital money in order to provide the necessary works for this purpose by bringing water either

(1) [1898] 1 Ch. 508, 511.

(2) 8 Times L. R. 201.

from some reservoir or other convenient place, and then by fixing the proper hydrants and other machinery and supplying them with hose and other requisites to enable water to be thrown over the house to extinguish any fire there might be? In my opinion that would be an extremely desirable thing, but the question which I have to decide is whether it can be done under s. 25 of the Act.

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The general words with which the section commences do not point to the exclusion of such a result, and the words of sub-s. (xiii.), which is the only sub-section that fits this case, are very wide. That sub-section enumerates "reservoirs, tanks, conduits, watercourses, pipes, wells, ponds, shafts, dams, weirs, sluices," used not only for agricultural or manufacturing, but also for other purposes. Some of those works are directly applicable to the supply of water to extinguish fire, some are not. Then the sub-section goes on, "and other works and machinery for supply and distribution of water for agricultural, manufacturing, or other purposes, or for domestic or other consumption." The works I am considering are certainly not for agricultural or manufacturing purposes, but they can be said to be for "other" purposes. They are not for domestic, but for "other," consumption. I have wide words in the sub-section, and the question is whether I ought to construe them widely, or say that they only apply to works ejusdem generis. It seems to me that it would be narrow to construe them so as to exclude the works in question. I do not think that the Act ought to be construed narrowly in a case like the present, where the works are a decided improvement and of large character, and can be reasonably provided for out of capital moneys.

But when I get so far, where am I to stop? For if I sanction the expenditure on fire hydrants, why not on hose? There must be hose in order to throw the water all over the house. Counsel for the remaindermen objected that the hose would have to be renewed from time to time. That is a matter which may be left to the trustees when the occasion arises, and will have to be dealt with as a matter of common sense. The tenant for life must be trusted not to come to the Court or to the trustees to sanction trivial expenditure.

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As I pointed out, sub-s. (xiii.) expressly mentions machinery for the "distribution of water for agricultural purposes," and that would include hose, if necessary, for agricultural purposes. Similar language occurs in sub-s. (iii.), which refers to "machinery for distribution of sewage." It seems to me that in the present case a hose is a necessary part of the machinery for the distribution of the water.

In my opinion this is a case in which I may, and if I may I will, sanction the expenditure upon the works in question.

I will now pass on to consider whether the cost of rebuilding the garden walls ought to be allowed.

I understand that there was in connection with the mansion-house a garden of considerable extent inclosed within walls, and that it has become necessary from the bad condition of the walls to raze them to the ground and erect new walls in their place, and it was thought convenient not to erect them altogether on the site of the old walls, but to extend the walls so as to bring in land which was not formerly within the garden.

Two questions, therefore, arise—first, whether the cost of inclosing a new garden can be thrown upon capital moneys at all; and, next, whether walls in substitution for old walls are within the Act.

It is suggested that walls are not within the Act, and in s. 25 there is no express mention of walls except in sub-s. (v.), where reference is made to sea walls. The applicant seeks to have this expenditure sanctioned under the term "inclosing" in sub-s. (vi.) of s. 25.

First, with regard to the question of inclosing. If "inclosing" had been found alone, I should have thought that it meant only taking in common or waste land, and adding to the inclosed land of the estate that which was formerly uninclosed. But that is not the language of the Act. Sub-s. (vi.) says, "Inclosing; straightening of fences; redivision of fields"; so that in connection with "inclosing" there are grouped in the same class two minor objects. One is in respect of straightening fences, as, for instance, where the fences are irregular, and thereby cause a loss of space, they may be straightened and the land thus improved. The other is in respect of the redivision of fields, as,

for instance, where it is necessary to sub-divide fields into two or more parts. These two minor objects are grouped with “inclosing,” and I should hesitate to say that the Legislature meant “inclosing” in the narrow sense in which I would have read it if it had stood alone. Therefore I think that the Act contemplated any “inclosing,” and, if so, why should not the inclosing of a garden come within the term? No doubt, if that is the proper meaning, an addition might be made to a farmyard by inclosing another piece of land adjoining the yard, or land might be inclosed elsewhere for other proper purposes, and if that can be done why should not the sub-section apply to the inclosing of a garden if it is an improvement to the estate? That being so, the walls built on a new site do not seem to me to make any difficulty, because they are clearly within the term “inclosing.” I think, therefore, that the cost of inclosing the new ground ought to be allowed.

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But the question of rebuilding presents more difficulty. I take Chitty J.’s decision in *In re Duke of Marlborough’s Settlement* (1) to mean that the Court must not sanction expenditure out of capital moneys on repairs, because it is the duty of the tenant for life to bear the cost of repairs. In the present case, however, it is a question, not of repairs, but of reconstruction. If it is necessary to pull down and destroy what is left of the old walls in order to put up a new building in their place, as has been done in this case, that is equivalent to building a new wall, and I think that the expense incurred ought to be allowed out of capital moneys. I will therefore sanction this expenditure under sub-s. (vi.).

I have decided this latter question without reference to sub-s. (xx.), which mentions “Re-construction, enlargement, or improvement of any of those works.” On that sub-section I should like to say that “those works” does not mean works which have been already constructed under powers given by the Act, but it means the “reconstruction, enlargement, or improvement” of any of the works mentioned in the earlier parts of s. 25, however or whenever those works were made. Take, for instance, a saw-mill. If a saw-mill was on the estate and it

(1) 8 Times L. R. 201.

KEKEWICH became necessary to reconstruct the saw-mill, the expense of
 J. that reconstruction could be allowed out of capital moneys under
 1907 sub-s. (xx.), notwithstanding that the saw-mill itself had not
 DUNRAVEN'S been originally erected, or paid for out of capital moneys, under
 (EARL) the powers of the Act.
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I do not see my way to holding that the rebuilding of the laundry comes within sub-s. (iv.) of s. 13 of the Settled Land Act, 1890, and I cannot allow that expenditure.

Solicitors: *Frere, Cholmeley & Co. ; Witham, Roskell, Munster & Weld.*

R. M.

KEKEWICH

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July 19.

In re ANSON'S SETTLEMENT.
 EARL OF LOVELACE *v.* ANSON.

[1907 A. 835.]

Trustees—Investment—Settlement—Construction—Shares in Company—Power to retain “in the present State of Investment thereof”—Substitution of Shares in Different Companies—Retainer of Shares—Unauthorized Investments—Accretion—Capital or Income.

By a marriage settlement made in 1902 it was declared that the trustees thereof should hold certain investments (which had been transferred by the husband into their joint names) upon trust either to allow the same “to remain in the present state of investment thereof” or, with specified consents, to sell the same, and invest the proceeds in investments therein mentioned and pay the annual income thereof to the husband for life, and after his death to his wife for life, and after the death of both, to hold the investments upon the usual trusts for the children of the marriage, with an ultimate trust, in the event of there being no children, in favour of the husband absolutely.

By clause 11 of the settlement the trustees were authorized to exercise any preferential right that might be offered to them to subscribe for new or other shares in any company in which they held shares or stock, and to dispose of the same, and every premium or profit arising therefrom was to be applied by them as if the same were income. One of the investments so transferred to the trustees consisted of 109 shares in an American financial company called the Northern Securities Company, which was formed to acquire and hold shares in other corporations, and held a large number of shares in, and controlled the policy of, two

American railway companies, the Great Northern Railway Company KEKEWICH and the Northern Pacific Railway Company. J.

In 1904 the capital stock of the Northern Securities Company was cancelled to the extent of 99 per cent., and in lieu of their 109 shares in that company the trustees of the settlement received thirty-two fully paid-up shares and a fractional share in the capital stock of the Great Northern Railway Company, forty-two fully paid-up shares and a fractional share in the capital stock of the Northern Pacific Railway Company, and one fully paid-up share and a fractional share in the Northern Securities Company.

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In 1905 and 1906 the trustees received three options to take up new stock in respect of the thirty-two shares in the Great Northern Railway Company and of the forty-two shares in the Northern Pacific Railway Company, and in exercise of these options they paid certain instalments, and in one instance sold the right of option. The husband having died and there being no children of the marriage, the wife claimed the proceeds of the options as income under clause 11 of the settlement, subject to repaying the trustees what had been paid in respect of the new shares:—

Held, that the shares in the two railway companies were not the same shares which were transferred to the trustees at the date of the settlement, and therefore the trustees were not authorized by the terms of the settlement to retain them.

In re Smith, [1902] 2 Ch. 667, distinguished and discussed.

Held, accordingly, that the accretions to the shares, by reason of the exercise of the options, belonged to the capital of the trust estate, and could not be treated as income under clause 11 of the settlement.

ADJOURNED SUMMONS.

The plaintiffs, the Earl of Lovelace, the Earl of Harrowby, and the Hon. Edward Alan Dudley Ryder, were the present trustees of a settlement dated October 25, 1902, and made in consideration of the marriage then intended, and shortly afterwards solemnized, between the Hon. Henry James Anson and the respondent Lady Adelaide Audrey Anson. By that settlement, after reciting that certain investments which were specified in the schedule thereto, and which included 109 shares of \$100 each in the Northern Securities Company of America, had been transferred by the Hon. H. J. Anson into the joint names of the plaintiffs as trustees, it was declared by clause 2 that the trustees should, after the solemnization of the said marriage, stand possessed of the investments so transferred into their joint names, upon trust either to “allow the said investments, or any of them, or any part thereof respectively, to remain in the present state of investment thereof,” or, with the consent in writing of

KEKEWICH H. J. Anson and Lady Adelaide Audrey Anson, during their joint lives, or of the survivor of them during his or her life, and after the death of such survivor, at the discretion of the trustees, to sell, call in or convert into money the same investments, and with the like consent, or at the like discretion, to invest the money thereby arising in or upon some or one of the investments thereby authorized, with power to vary the same; and the trustees were to stand possessed of the investments so transferred into their joint names and the varied investments (therein called the husband's trust fund), upon trust to pay the annual income thereof to H. J. Anson during his life, and after his death, if Lady Adelaide Audrey Anson survived him, to pay the annual income thereof to her for the residue of her life without power of anticipation, and after the death of both, then the capital and income were to be held in trust for the issue as therein mentioned, with the usual powers of appointment; and it was declared that if there should not be any child of the marriage who should attain a vested interest under the trust declared in default of appointment, then the husband's fund should, after the death of Lady Adelaide Audrey Anson, be held in trust for H. J. Anson absolutely.

Clause 8 set out the investments in which the trust funds might be invested, but these admittedly did not include such an investment as the Northern Securities Company's shares.

By clause 11 of the settlement it was provided as follows: "In case any preferential right to take or subscribe for any new or other shares or stock in any company shall be offered to the trustees or trustee as holding any shares or stock in such company for the time being subject to the trusts of these presents, it shall be lawful for the trustees or trustee, in their or his discretion, to renounce or to relinquish the benefit of such preferential right, either absolutely or in favour of the person for the time being entitled to the income of the said shares or stock, to the intent that such person may have the benefit thereof, or otherwise to subscribe for such new or other shares or stock, or any part thereof, and to dispose of or transfer the same, or the title thereto, and every premium or profit arising therefrom shall be held and applied by the trustees or trustee

as if the same were income arising from the said shares or KEKEWICH stock."

H. J. Anson died on February 26, 1904, having by his will, dated October 27, 1902, appointed the defendants the Hon. Frederick William Anson and Richard Hamilton Rawson executors and trustees thereof, and disposed of his property as therein mentioned.

There were no children of the marriage between H. J. Anson and Lady Adelaide Audrey Anson.

The Northern Securities Company was incorporated under the laws of the State of New Jersey on November 13, 1901, for the purpose of acquiring and holding as investments the securities of other corporations, and it held a large number of shares in two American companies called the Great Northern Railway Company and the Northern Pacific Railway Company, practically controlling the policy of these two railway companies. The Courts in America held that, as a matter of law, the Northern Securities Company could not hold the stocks of these two railway companies (1), and the railway companies were forbidden to permit the Northern Securities Company to vote or collect dividends on the shares held by it. Accordingly in 1904 the capital stock of the Northern Securities Company was cancelled to the extent of 99 per cent., and there were delivered or transferred to the shareholders, as against the cancelled amounts of their respective holdings, certain pro rata amounts of capital stock of the said Great Northern Railway Company and of the Northern Pacific Railway Company. In the result the 109 shares in the Northern Securities Company held by the plaintiffs as trustees of the said marriage settlement became converted into, or were represented by, thirty-two fully paid-up shares of \$100 each in the capital stock of the said Great Northern Railway Company, a fractional fully paid-up share of \$55·64 in the same company, forty-two fully paid-up shares of \$100 each in the capital stock of the Northern Pacific Railway Company, a fractional fully paid-up share of \$37·62 in the same company, one fully paid-up share of \$100 in the capital stock of the Northern Securities Company, and a fractional fully paid-up share of \$9 in the same company.

(1) *Northern Securities Co. v. United States*, (1904) 193 U. S. 197.

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The Great Northern Railway Company was incorporated in March, 1889, under the laws of the State of Minnesota, and the Northern Pacific Railway Company was incorporated on March 15, 1870, by a special Act of the State of Wisconsin. The liability of shareholders in the case of both companies was limited to the nominal amount of the stock. In October, 1905, the plaintiffs sold the fractional share of \$55.64 in the Great Northern Railway Company for 32*l.* 18*s.* 6*d.*, and the other fractional shares in the Northern Pacific Railway Company and the Northern Securities Company for 15*l.* 10*s.* 4*d.* and 5*l.* 5*s.* 6*d.* respectively. In October, 1905, the plaintiffs, as holders of the thirty-two shares in the capital stock of the Great Northern Railway Company, received an option under which they were given the right of taking up at par six shares of \$100 each and two-fifths of a share of the same amount in certain new stock of the said company. This option they exercised on December 19, 1905, and paid an instalment of 33*l.* 0*s.* 11*d.* On January 15, 1906, before another instalment became payable, they sold the benefit of their right in respect of the said new stock for 263*l.* 19*s.* In December, 1906, the plaintiffs received another option in respect of the same thirty-two shares, under which they were given the right of taking up at par twelve shares of \$100 each, and four-fifths of a share of the same amount in certain new stock of the same company. This option they exercised, and paid instalments amounting to 132*l.* 3*s.* 8*d.* which had become due. In December, 1906, the plaintiffs, as holders of the forty-two shares in the Northern Pacific Railway Company, received a third option, under which they were given the right of taking up at par twenty-five shares of \$100 each and one-fifth of a share of the same amount in certain new stock of the said company. The plaintiffs exercised this option, and paid instalments amounting to 65*l.* 8*s.* 11*d.* which had become due. These three options were exercised by the plaintiffs without prejudice to any questions as between them and Lady Adelaide Audrey Anson. She now claimed to be entitled to the proceeds of the six and two-fifths shares in the Great Northern Railway Company, the twelve and four-fifths shares in the same company, and the twenty-five and one-fifth shares in the Northern Pacific Railway Company as

income of the husband's trust fund comprised in the marriage settlement, subject to repaying the plaintiffs the amounts which they had paid in respect of these shares. On June 4, 1907, the trustees of the settlement took out an originating summons, asking (inter alia) how they ought to deal with the proceeds of the sale of the shares taken up under the first option, and the right to take up the shares under the other two options.

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Austen-Cartmell, for the trustees of the settlement.

A. F. C. C. Luxmoore, for the tenant for life under the settlement.

Lady Adelaide Audrey Anson is entitled to the proceeds of these options by virtue of clause 11 of the settlement. It is admitted that these shares in the two railway companies are not authorized investments within the investment clause, but they are shares which the trustees may retain under clause 2 of the settlement. The Northern Securities Company having been formed to hold shares in other corporations, including these two railway companies whose policy it controls, it is submitted that these present investments are practically in the same state of investment in which they were at the date of the settlement. The case is governed by the decision of Buckley J. in the case of *In re Smith* (1), where it was held that the ordinary shares in a new reconstructed company could be retained by the trustees under a similar power in a will. The remarks of Buckley J. entirely cover this case. He said (2): "Did not the testator himself acquire these shares, in the sense that he owned the shares which became these shares?" Here also the trustees have done nothing themselves beyond accepting the shares in the two railway companies, and they could not well have refused to take them. The shares were therefore properly retained, and were really the shares held by the Northern Securities Company, and so come within the words in clause 2 giving the trustees power to retain "in its present state of investment." The proceeds of the preferential rights come within clause 11 of the settlement, and must be considered as income, and not capital.

J. I. Stirling, for the executors and trustees of the husband's will, representing the remaindermen. These shares are not

(1) [1902] 2 Ch. 667.

(2) [1902] 2 Ch. 670.

KEKEWICH investments which can be retained under the settlement, as J. they are not what they were at the date of the settlement. 1907 If the test applied by Buckley J. in the case of *In re Smith* (1) ANSON'S SETTLEMENT, *In re*, is applied here, it cannot be said that these shares are in any way the same investment. The Northern Securities Company was a purely financial company formed to acquire and LOVEFACE (EARL) hold shares and investments; it was not a railway company in v. any sense of the word. *In re Smith* (1) does not apply. In the ANSON. present case there was no reconstruction or transformation of an old company into a new one. The real test is, Are these shares in the old state of investment, only in a new form? The two railway companies are incorporated in different States from that in which the Northern Securities Company was incorporated, and deal with a different subject-matter. It is not the same investment. In the case of *In re Morris* (2), which was referred to in *In re Smith* (1), there had been a reconstruction of a banking company which was an unlimited company, and it was held that the shares in that company, as well as in the new company, were unauthorized securities, although there was power to retain the bank shares in "the present state of investment."

In the recent case of *In re Slater* (3), which was a case of ademption, the Master of the Rolls said that even where a change had been effected in the nature of the property by virtue of an Act of Parliament ademption would follow. That was the case of a bequest of interest in money invested in the Lambeth Waterworks Company, which undertaking was subsequently acquired by the Metropolitan Water Board under an Act of Parliament, and new stock was issued. It was held to be a sufficient transformation to entirely alter the character of the bequest, although effected by an Act of Parliament, and the Metropolitan Water Board stock did not pass. So that, although the alteration was effected under circumstances entirely out of the control of the testator, it did not affect the question whether it was the same stock or not. In the present case these Great Northern and Northern Pacific shares, not being the same investment as the Northern Securities shares, are unauthorized securities, and the

(1) [1902] 2 Ch. 667.

(2) (1885) 52 L. T. 462.

(3) [1907] 1 Ch. 665.

proceeds of the options must be treated as capital of the trust KEKEWICH funds.

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KEKEWICH J. The question for decision, as I understand it, arises in this way. By the marriage settlement of October 25, 1902, there were settled, among other things, certain shares in an American company called the Northern Securities Company. The trusts upon which the trust funds were to be held are for the moment immaterial, except that, in the event of the death of the husband (which has happened) without children, some of the funds, including the shares in the Northern Securities Company, came back to him, subject to the life interest of his wife; otherwise, and perhaps even in that, the trusts are of the usual character, and no question turns upon them. The Northern Securities Company shares are not recognized as authorized by the investment clause. About that there is no question, and, if I were now dealing with the shares of the Northern Securities Company, there would be no doubt that they would have been an unauthorized investment, apart from clause 2 of the settlement. But clause 2 of the settlement distinctly authorizes them in this way, that the trustees are to stand possessed of the investments transferred into their joint names upon trust that the trustees or trustee shall either allow the said investments, or any of them, or any part thereof respectively, to remain in the present state of investment, or shall, with certain consents, or at the discretion of the trustees, convert. If they converted the proceeds were to be invested in a manner which did not cover Northern Securities Company's shares, but they had that power to retain. They did retain; the shares have never been sold, but the company itself was really a financial company; it did not carry on any business of a manufacturing character, but was formed for the purpose of making investments in the shares of railway companies, and it did invest in a large number of shares in two companies called the Great Northern Railway Company and the Northern Pacific Railway Company. Those shares were held by the Northern Securities Company for the benefit of their shareholders, with a view to making a profit, either by retention of the shares, or, I suppose, by sale. In view of the decision of the Supreme

KEKEWICH Court of the United States, this company found themselves in a difficulty as regards holding shares in these railway companies, and so they hit upon a scheme, which only applied to 99 per cent. of their shares, and which provided for the shares which the Northern Securities Company held in those two railways being distributed among their shareholders in the Northern Securities Company, in lieu of their shares in that company. In other words, shares in the railway companies were substituted for shares in the Northern Securities Company; and, the operation being completed, the shareholders, including the trustees of this settlement, ceased, as regards the 99 per cent., to be holders in the Northern Securities Company. The question arises whether they still hold the shares which were transferred to them at the date of the settlement, and which are authorized by clause 2 of the settlement to be retained. The practical reason for raising the question is this, that it is contended by the tenant for life that, these shares now held by the trustees being profit shares, clause 11 gives her, as tenant for life, any addition or accretion to them. There has been, as a matter of fact, an accretion by the allotment to the trustees of other shares, and, if clause 11 applies, the plain result is that the tenant for life takes that accretion for her own benefit as a premium or bonus. If, however, the trustees are not retaining shares in pursuance of the power conferred by clause 2, then it is admitted they are not trustees holding any shares or stock in such company within the meaning of clause 11. The result is that the directions respecting the premium on advantages of accretion do not apply. Without reading clause 11 through, that, I understand, is the question; and it all turns upon this: Are these shares in the two railway companies shares which the trustees are, by the terms of the settlement, authorized to retain; and they are not authorized to retain them unless they really are the same shares, the same investment, which was transferred to them at the date of the settlement.

At the first blush there seems to be no doubt that they are not the same shares. They are not shares in the Northern Securities Company; they are not shares even in a reconstructed company, one built up on the ashes of the Northern Securities Company. They are shares in two entirely different companies

which existed before, in which the Northern Securities Company held shares, and which it has been found convenient to transfer to the shareholders in the Northern Securities Company on the cancellation of their shares in that company. I find considerable difficulty in discussing a question of such a character. The shares are not the same, and only the same shares are to be held. The two companies are different—the two holdings are entirely different; even the company is not the same in substance: one was called a financial company, and the shares which are now held are in two railway companies, dealing in quite a different subject-matter; so that it is difficult to see how the provision in clause 2 for the retention of shares can possibly apply to the shares in the railway companies.

But I am referred to a case decided by Buckley J. so long ago as 1902—*In re Smith* (1), a case which has been before me again and again in chambers, and which must, I suppose, have been present to the minds of many persons making applications before me—but counsel are unable to refer me to any case which deals with this question. I say that, because the duty of a judge of first instance, in dealing with a case about the soundness of which he has doubts, is very much varied according as it is a recent decision, and according as it has been either followed and acknowledged by judges and counsel, or may be presumed to have been followed. It is unwise, and therefore wrong, for a judge to express a difference of opinion from a case decided by a judge of co-ordinate jurisdiction, if it is of some age and has been followed, so that the new decision may be upsetting the practice, or at any rate raising doubts in the minds of persons, whether their titles are good or not.

Now, I find myself as regards this quite at liberty to express my opinion, if it is necessary to do so. It does not come new to me, because I have reflected on this case very frequently. It is not necessary for me to express a judicial opinion, or one really determining what, as a judge, I certainly think. But, as the case has been decided and relied upon, I do think it right to say that I find very great difficulty in following it. What I might do on further argument I cannot say. I have studied the

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KEKEWICH judgment, I have had it commented upon on the present occasion, and I do not see how the learned judge arrived at the conclusion which he did, namely, that the two companies with which he was dealing were really the same. I will not comment on the language, because I pass on to notice that that was a case of reconstruction. One company was dissolved, or was wound up, for the sole purpose of transferring the property to another company, that other company being formed for the purpose of taking over the business and occupying the position of the old company, and the shareholders in the old company being satisfied by the allotment to them of the corresponding number of shares in the new company. There, no doubt, you have large elements, I will not say myself of sameness, but of similarity; and it may be that it is right to come to the conclusion that the reconstructed company is really in substance the same company as the old, so that trustees who are authorized to retain shares in the old company might now be considered to retain shares in the new. But I cannot see my way to that conclusion myself at present. If I were bound to express an opinion now, before actually differing from the learned judge. I should probably take time for consideration, but I could not, as at present advised, follow that decision. Beyond that, it is not necessary for me to say a word, because this is not a case of reconstruction, and the elements which there convinced the learned judge of sameness are here entirely wanting. I have pointed out the differences. The circumstances are different; the manner of dealing with the shares is different; the subject-matters of the companies' concerns are different; there is no sameness at all. The result is to my mind, without the slightest difficulty, doubt, or hesitation, that the shares in the two railway companies are not shares which the trustees are authorized to retain; and therefore these trustees cannot hold any accretion to these shares upon the trusts or for the purposes defined in clause 11.

Solicitors for all parties : *Corbould, Rigby & Co.*

G. M.

In re COMPAGNIE INDUSTRIELLE DES PÉTROLES'
APPLICATION.

WARRING-
TON J.

In re PRICE'S PATENT CANDLE COMPANY'S TRADE
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*Trade Mark—Registration—"Motricine"—Similar Word already on Register—
"Same Class or Description of Goods"—"Calculated to deceive"—Onus
of Proof—Rectification of Register—"Motorine"—Descriptive Word—
Invented Word—"Word having no direct Reference to Character or Quality
of Goods"—Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 9, sub-s. 4; ss. 11,
19, 21.*

In 1901 the opponents registered the word "motorine" as a trade mark for lubricating oil, with a disclaimer of the right to the exclusive use of the word "motor." Since registration they had sold large quantities of a lubricating oil suitable for, but not confined to, motors under that name. In 1906 the applicants applied to register the word "motricine" as a trade mark for a spirit for motive power purposes derived from petroleum. The opponents opposed the application, and the registrar refused to register the mark. On an application by the applicants that the registrar might be directed to proceed with the registration of their mark, and that the opponents' mark might be expunged from the register:—

Held, that under s. 11 of the Trade Marks Act, 1905, the onus of shewing that the proposed trade mark was not calculated to deceive rested on the applicants; that they had failed to discharge that onus; that that being so the Court would decline to exercise its discretion under s. 21 of the Act of allowing conditional registration; and that the application to register must therefore be refused.

Eno v. Dunn, (1890) 15 App. Cas. 252, followed.

Held, also, that the word "motorine" had "no direct reference to the character or quality of the goods," and was therefore a good trade mark under s. 9, sub-s. 4 of the Act, and that the application to expunge it from the register must consequently be refused.

MOTION.

This was an application by the Compagnie Industrielle des Pétroles—(1.) that the decision of the Registrar of Trade Marks, whereby he refused registration of their trade marks, consisting of the word "motricine," might be reversed, and that the registrar might be directed to proceed with their application, notwithstanding the opposition thereto of Price's Patent Candle

WARRINGTON J. Company, Limited; and (2.) that the Register of Trade Marks might be rectified by expunging therefrom the trade mark of Price's Patent Candle Company, Limited, consisting of the word "motorine."

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The applicants were a French company, which carried on a large trade in petrol spirit upon the continent of Europe and in other places. On the continent of Europe they sold petrol spirit in large quantities under the name of "motricine," and in most countries of the continent they had a registered trade mark consisting of that name.

The opponents were the well-known firm of Price's Patent Candle Company, Limited, who in the year 1901 had registered the word "motorine" in class 47 as a trade mark for lubricating oil, with a disclaimer of the right to the exclusive use of the word "motor." Since the registration of that trade mark the opponents had sold large quantities of a lubricating oil suitable for, but not confined to, motors under their registered name of "motorine."

In 1904 the applicants applied in England to register the word "motricine" as a trade mark in respect of light mineral oils for driving motor cars and engines. The consent of the opponents was asked for and refused, and as a result the registrar refused to register the proposed trade mark. There matters remained until 1906, when the applicants again applied to register the word "motricine" as a trade mark in classes 47 and 50 as a mark for a spirit for motive power purposes derived from petroleum. That application was again opposed by the opponents, and again the registrar refused to register the mark. The present application was an appeal from that decision.

The evidence shewed that the word "motorine" was known to persons familiar with such things as denoting the particular lubricating oil which bore that name, and which was in fact manufactured by the opponents.

A. J. Walter, K.C., and L. W. Byrne, for the applicants.
The applicants' and the opponents' goods are not of the same class or description of goods. "Motricine" is a petrol spirit

and “motorine” a lubricating oil. The former cannot be used as a lubricant, for if so used it would dissolve out every trace of a true lubricant. It is true that both “motricine” and “motorine” are used for motors, but there is no likelihood of a person confusing the two. Goods are not of the same class merely because they are sold by the same persons. The mere fact that both the goods are included in the same technical class should not operate on the mind of the Court. The ratio decidendi as to the class of goods being different is discussed in *In re Australian Wine Importers, Ltd.* (1) and *In re Leiner’s Trade Mark.* (2) No danger to the public can arise from the registration of “motricine.” Under the Petroleum Acts, 1871 and 1879 (34 & 35 Vict. c. 105, ss. 3, 6 and 7; 42 & 43 Vict. c. 47, s. 2), and the Statutory Rules and Order of 1903 made under s. 5 of the Locomotives on Highways Act, 1896 (59 & 60 Vict. c. 39), the applicants are bound to keep their petrol in a licensed place and to sell it under a licence with the words “Petroleum Spirit—Highly Inflammable,” indelibly stamped or marked on the tins. On the other hand, there are no statutory restrictions attaching to the sale of the opponents’ goods.

Further, the opponents having disclaimed the right to the exclusive use of the word “motor” as part of their trade mark, there is no such resemblance between the two marks as is calculated to deceive: *In re Loftus’ Trade Mark.* (3) Under s. 21 of the Act of 1905 (4) the Court can impose conditions as to the mode of user of a trade mark.

- (1) (1889) 41 Ch. D. 278.
- (2) (1903) 20 Rep. Pat. Cas. 253.
- (3) [1894] 1 Ch. 193.
- (4) The Trade Marks Act, 1905 (5 Edw. 7, c. 15), provides:—
Sect. 3: “In and for the purposes of this Act (unless the context otherwise requires):—
“A ‘registrable trade mark’ shall mean a trade mark which is capable of registration under the provisions of this Act. . . .”
Sect. 9: “A registrable trade mark must contain or consist of at least

one of the following essential particulars:—
“ (4.) A word or words having no direct reference to the character or quality of the goods, and not being according to its ordinary signification a geographical name or a surname;”
Sect. 11: “It shall not be lawful to register as a trade mark or part of a trade mark any matter, the use of which would by reason of its being calculated to deceive or otherwise be disentitled to protection in a Court

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[WARRINGTON J. What do you say are the special circumstances referred to in that section which would make it proper for me to allow the registration of "motricine" ?]

The mode of user and the locale of user. The object of the Act of 1905 was to facilitate the registration of trade marks. Sect. 21 qualifies s. 19, and enables the Court to allow registration in a limited manner.

[WARRINGTON J. Are the applicants willing to undertake to sell their petrol in quantities of not less than two gallons in tins of the same form as the tins of the other manufacturer which have been exhibited and to label them "Petroleum Spirit—Highly Inflammable" ?]

They are quite prepared to give that undertaking.

Then, as to the second branch of the application, s. 64 of the Patents, Designs and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), required as a condition of the registration of a trade mark (inter alia) that the mark should consist of "a fancy word or words not in common use." Sect. 10 of the Patents, Designs and Trade Marks Act, 1888 (51 & 52 Vict. c. 50), substituted for those words the words "an invented word or invented words." "Motorine," by its termination "ine," suggests an oil suitable for use in motors, and has therefore a direct reference to the character or quality of the goods. It is not, therefore, an invented, but a descriptive, word: *In re Meyerstein's Trade Mark* (1); *Christy v. Tipper* (2); *In re Unedea Trade Mark*. (3)

of justice, or would be contrary to law or morality, or any scandalous design."

Sect. 19: "Except by order of the Court or in the case of trade marks in use before the 30th day of August, 1875, no trade mark shall be registered in respect of any goods or description of goods which is identical with one belonging to a different proprietor which is already on the register with respect to such goods or description of goods, or so nearly resembling such a trade mark as to be calculated to deceive."

Sect. 21: "In case of honest con-

current user or of other special circumstances which, in the opinion of the Court, make it proper so to do, the Court may permit the registration of the same trade mark, or of nearly identical trade marks, for the same goods or description of goods by more than one proprietor, subject to such conditions and limitations, if any, as to mode or place of user or otherwise, as it may think it right to impose."

(1) (1890) 43 Ch. D. 604.

(2) [1905] 1 Ch. 1.

(3) [1901] 1 Ch. 550; [1902] 1 Ch. 783.

Sect. 9, sub-s. 4, of the Act of 1905 has not altered the law as expressed in *In re Meyerstein's Trade Mark* (1) and *Christy v. Tipper*. (2) The insertion of the word "direct" in the sub-section was to rule out indirect reference to the character or quality of the goods.

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—

Upjohn, K.C., Cave, K.C., and Sebastian, for the opponents.

[WARRINGTON J. I will not trouble you on the point as to the rectification of the register, as I am satisfied that the word "motorine" has "no direct reference to the character or quality of the goods." What do you say on the point as to the registration of the word "motricine" ?]

The word "motricine" is the feminine form of "motorine," according to French derivation, and so nearly resembles the latter as to be calculated to deceive, and the Court will therefore refuse to allow its registration: Trade Marks Act, 1905, ss. 11, 19. The power given to the Court by s. 19 is discretionary. Sect. 11 imposes a restriction on registration, viz., where it would be calculated to deceive. That section is in similar terms to s. 73 of the Act of 1883, upon the construction of which it was held in *Eno v. Dunn* (3) that the onus was on the applicant to shew affirmatively that the mark would not be calculated to deceive. In the present case the applicants have failed to discharge that onus. The applicants' and the opponents' goods are of the same class, and are handled by the same persons. "Motorine" has never been applied to anything except the opponents' lubricating oil, which is largely dealt in and has obtained a high reputation in the English market. If "motricine" is allowed to be put on the register the public will be led to believe that the goods in respect of which it is used are the opponents' goods. If, therefore, accidents happened by explosion, as they might well do in the case of a dangerous article like "motricine," the effect would be to seriously damage the opponents' trade. In *In re Australian Wine Importers, Ltd.* (4) the goods were distinct. As was pointed out by Lord Macnaghten in *Eno v. Dunn* (5), the question whether the

(1) 43 Ch. D. 604. (3) 15 App. Cas. 252.
(2) [1905] 1 Ch. 1. (4) 41 Ch. D. 278.
(5) 15 App. Cas. 264.

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proposed trade mark is likely to deceive is one between the applicants and the public. Sect. 11 is independent of whether there is an existing mark on the register, and is imperative. If, therefore, the mark proposed to be registered is calculated to deceive, s. 11 prohibits its registration. Sect. 21 does not assist the applicants. That section was intended to meet the case where the only objection to the registration of an applicant's mark is the existence of a similar mark already on the register. *In re Turney & Sons' Trade Mark* (1) and *Eastman Photographic Materials Co. v. John Griffiths Cycle Corporation* (2) are cases in which apparently different goods have been held to come within the same class or description of goods. The use of the words "motorine" and "motricine" are obviously liable to lead to confusion, as was the case in *Dunlop Pneumatic Tyre Co. v. Dunlop-Truffault Cycle and Tube Manufacturing Co.* (3) and *Valentine Meat Juice Co. v. Valentine Extract Co.* (4) Both the applicants' and opponents' goods are sold for the purposes of being emptied into motor car tanks; both are sold in tins which conceal their differences of colour, smell, and degree of fluidity. The suggested conditions, if imposed by the Court, would not prevent liability to error. It is impossible to devise conditions which would prevent mistakes where, as here, human agency enters.

A. J. Walter, K.C., in reply. The opponents have entirely misunderstood the effect of s. 11 of the Act of 1905. That section does not apply inter partes, but between the person applying to register a mark and the public. Its object is to secure the purity of the register. The prohibition in the section refers to the deception inherent in the words themselves, and not to deception arising from similarity to words comprised in other trade marks: *In re Horsburgh & Co.'s Application*. (5) *Eno v. Dunn* (6) was a case of fraud; the defendants were there representing their goods to be something which they were not in fact. Here there is no suggestion of fraud, and therefore that case does not apply.

(1) (1893) 11 Rep. Pat. Cas. 37.

(2) (1898) 15 Rep. Pat. Cas. 105.

(3) (1896) 12 Times L. R. 434.

(4) (1899) 17 Rep. Pat. Cas. 1.

(5) (1878) 53 L. J. (Ch.) 237.

(6) 15 App. Cas. 252.

WARRINGTON J. This is an application by way of an appeal from the registrar, who has refused to register a trade mark of the applicants, and it is at the same time an application by the applicants for the rectification of the Register of Trade Marks by expunging therefrom a certain trade mark of Price's Patent Candle Company, Limited. The opponents to the application to register and the opponents to the application to rectify are the same company, namely, Price's Patent Candle Company, Limited. [His Lordship stated the facts, and continued:—]

Both "motricine" and "motorine" are manufactured from petroleum, but the one is the petrol spirit, and is highly explosive, the other is the lubricating oil, from which the explosive properties have in some way been eliminated, and which is not explosive. Both the petrol spirit and the lubricating oil are, according to the usual practice of the trade, sold by the same persons. They are both required by the same persons, and the trade in them is in many respects the same. They are both enclosed in tins, so that the nature of the substance is not ascertainable by the person who buys it or who desires to use it until he actually comes to use it. The two substances themselves are different in appearance, one being liquid like water, and of the colour of water, and the other a thick viscous semi-fluid substance. Neither of those differences is apparent or ascertainable until the actual use. I have evidence of the mode in which the two things are sold and used, and on that evidence, which I need not repeat in detail, I have come to the conclusion that it is, to say the least of it, quite possible that a person, not being a skilled person, going to a shop in which these lubricating oils and petrol spirits are dealt in and asking for "motorine" might have handed to him instead of a tin of "motorine" a tin of "motricine." I think that is quite possible on the evidence, not—I desire to say plainly—because witnesses have said that in their opinion there is a possibility of that confusion—that is a matter for the Court on the facts of which the Court has cognizance—but, forming my own opinion on the facts which I have heard in evidence, I think it is, to say the least, quite possible that there might be confusion between the two tins; and I think it is quite possible that the result of such a

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confusion might be extremely serious, because if a person, not being a skilled person, were to open a tin of "motricine" thinking it to be "motorine," as he might very well do, it is, to say the least, quite possible that the result might be a very serious disaster, whether he actually attempted to use the "motricine" for lubricating purposes, or whether, thinking it was lubricating oil, he opened the tin in the presence of an exposed light or under some other circumstances rendering risk of explosion imminent. I think, therefore, there is a possibility of confusion between these names if petrol is sold under the name of "motricine," and I think that possibility of deception might be of serious consequences to the public, and not merely as affecting the trade of Price's Patent Candle Company.

In those circumstances what is the duty of the Court? There are three sections of the recent Trade Marks Act, 1905, which come into consideration. The first of these is s. 11. The other two sections are ss. 19 and 21. [His Lordship read the sections, and continued:—] The first question is, Is this a case to which s. 11 applies? That section takes the place of s. 73 of the Patents, Designs and Trade Marks Act, 1883, which was as follows: "It shall not be lawful to register as part of or in combination with a trade mark any words the exclusive use of which would by reason of their being calculated to deceive or otherwise, be deemed disentitled to protection in a Court of justice, or any scandalous design." By the Patents, Designs and Trade Marks Act, 1888, the word "exclusive" in that section was struck out. It will be observed that s. 73 is practically the same as s. 11 of the present Act, except that in s. 73 the restriction is confined to words calculated to deceive, whereas in the present Act it extends to any matter calculated to deceive, and which by reason of its being so would be disentitled to protection in a Court of justice. Sect. 73 came under the consideration of the House of Lords in *Eno v. Dunn* (1), where the principle on which the Court ought to deal with cases under that section seems to me to have been carefully expounded, especially by the two Lords who addressed the House, namely, Lord Watson and Lord Herschell, in terms which are binding on

(1) 15 App. Cas. 252.

me, and which, I think, leave no doubt as to what the principle really is. Lord Watson, after reading the section, says (1): "These prohibitory clauses cast upon the applicant the duty of satisfying the comptroller, or the Court, that the trade mark which he proposes to register does not come within their scope. In an inquiry like the present, he does not hold the same position which he would have occupied if he had been defending himself against an action for infringement. There, the onus of shewing that his trade mark was calculated to mislead rests, not on him, but upon the party alleging infringement; here he is in petitorio, and must justify the registration of his trade mark by shewing affirmatively that it is not calculated to deceive. It appears to me to be a necessary consequence that, in dubio, his application ought to be disallowed." He then examines the facts, and comes to the conclusion, on those facts, that the trade mark proposed to be registered would be calculated to deceive, and, having come to that conclusion, finds that it cannot be registered. The trade mark there which it was sought to register was a label representing a woman holding up a dish of cakes with the words "Dunn's Fruit Salt Baking Powder." The opposition was by the proprietor of Eno's Fruit Salt. The label on Eno's Fruit Salt was the well-known oblong label with the representation of a vine round the edge of it, with "Eno's Fruit Salt" in the middle. In the course of the case the opponent was compelled to give up his claim to the exclusive use of the words "Fruit Salt" as a trade mark, and the matter was dealt with by the House of Lords on the same footing as if Eno's mark had not been on the register at all, and merely on the footing that the words "Fruit Salt" had from their use by Eno come to denote the powder, which when in contact with water effervesces, sold by Eno. In this case I have the same fact as I have already mentioned, namely, "motorine," which has come to denote a particular manufacture of lubricating oil. The article in respect of which Dunn sought to register his trade mark was a baking powder. Notwithstanding the distinct character of the goods, Lord Watson, Lord Herschell, and Lord Macnaghten came to the conclusion that as a matter of fact the registration was calculated to deceive.

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I have read the mode in which Lord Watson expresses the principle on which he acts. Lord Herschell expresses it in the same way, though not in the same words. He says (1): "The only point insisted on was that it ought not to be registered because it was calculated to deceive." He then comes to the conclusion that the proposed use of the words "Fruit Salt" would be calculated to deceive; but he goes on to say (2): "I do not think it is necessary to go so far as this. I think it is enough to say that I am not satisfied that there would be no reasonable danger of the public being so deceived." In those words he states the same principle as that which is expressed, perhaps more directly, by Lord Watson in the passage I have already read, and he comes to the same conclusion as Lord Watson did. Lord Macnaghten comes to the same conclusion as Lord Watson and Lord Herschell, and points out, in the only passage of his speech to which I think it is material to refer, that it is the interests of the public which have to be regarded in considering s. 73, and that it is immaterial whether the proposed registration is or is not likely to injure the opponent in his trade.

Now it has been said very forcibly on the part of the applicants in the present case that *Eno v. Dunn* (3) depended on the fact that Dunn was, in the opinion of the House, seeking by the registration of his trade mark to get an unfair advantage for his trade by reason of the reputation of the proprietor of Eno's Fruit Salt. In the two speeches of Lord Watson and Lord Macnaghten that fact is referred to, but I have carefully considered both those speeches and the principles enunciated in them, and I have come to the conclusion that the decision at which the learned Lords arrived under s. 73 was independent of that fact; and in Lord Herschell's judgment it is quite plain that that is so, for Lord Herschell makes no reference from the beginning to the end of his address to the House to any case of fraudulent intent, or any case of proposed adoption of the name of Fruit Salt with the object of acquiring an unfair advantage by reason of Eno's reputation. Lord Herschell in plain terms puts the case simply

(1) 15 App. Cas. 259.

(2) 15 App. Cas. 261.

(3) 15 App. Cas. 252.

on the question, Has the applicant made out, or has he not made out, that his mark is not calculated to deceive? WARRINGTON J.

After stating, as I have, the conclusion of fact at which I have arrived, I can only apply the principles laid down in *Eno v. Dunn* (1) by holding that in this case also the applicants have not made out that the trade mark which they seek to register is one the use of which would not be calculated to deceive. If they do not make out that, then it seems to me that the mark is not one which is entitled to protection, and consequently is not one which ought to be registered under s. 11. I think they have not made it out, and in my judgment, therefore, the mark is not one which ought to be registered under that section.

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But it has been argued that the Court has a wider discretion, and that that discretion may be exercised under ss. 19 and 21 by allowing this mark to be registered with some conditions and limitations intended to meet the special circumstances which are referred to in s. 21, and to prevent the possibility of deception. In coming as I do to the conclusion that s. 11 is in the applicants' way, I do not think that I am entitled to resort to s. 21, and to allow the mark to be registered subject to conditions and limitations. It appears to me that s. 21 is intended to apply to cases falling under s. 19 where the objection to the mark is simply the existence on the register of another mark of another trader. If I had to deal with the case under s. 19 I think there would be some difficulty, not a difficulty arising out of the similarity of names, because I am satisfied that the names are so similar that, if the description of goods in respect of which the applicants' trade mark is sought to be registered is the description of goods in respect of which the opponents' mark is registered, the case is one which would fall within s. 19, and the applicants' mark ought not to be registered. Although my decision is under s. 11, I have naturally considered s. 19, and under s. 19, if it were necessary to decide it, I should come to the conclusion that for the purposes of that section the goods in respect of which the mark is sought to be registered are of the same description as those in respect of which a mark has been registered. They are not the same goods, but I think

(1) 15 App. Cas. 252.

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within the meaning of this Act the description of goods is the same; they are sold to the same persons, they are used by the same persons; they are used, it is true, for different purposes, but I think, having regard to such a case as *In re Australian Wine Importers, Ltd.* (1) and to cases similar to that, one ought not to come to the conclusion that the goods in respect of which the trade mark is proposed to be registered are such goods, or such description of goods, as those in respect of which there is already a mark on the register. If I come to that conclusion, that would leave me then to consider whether it is possible in this case to impose conditions or limitations which would prevent the possibility of deception between the two marks, and I have tried to devise some form of undertaking which in that case would be sufficient for the purpose. But I do not think I have been successful. It seems to me that, without imposing upon Price's Patent Candle Company a restriction as to the mode in which they should use their mark, which I cannot do, an undertaking as to the shape or size of the tin, or anything of that sort, would not obviate the possibility of deception of unskilled persons such as have been referred to in the evidence. On the whole it seems to me that the registrar has come to the right decision, and I must refuse the first part of the application.

But there is a second part of the application which has to be mentioned, and that is the application that the opponents' mark "motorine" may be struck off the register as not being properly registrable under s. 9 of the Act of 1905. The Act of 1905 defines a registrable trade mark, and says that it must consist of at least one of certain essential particulars, those material for the present case being "a word or words having no direct reference to the quality or character of the goods." The word "direct" is inserted in this Act for the first time. Is the word "motorine" a word which has direct reference to the character or quality of the goods? The goods in question consist of lubricating oil. I cannot see how the word "motorine" has any direct reference to the character or quality of those goods. No doubt it suggests that in some way they are oils which are to be used in connection with a motor, but beyond that it has no reference either to the

(1) 41 Ch. D. 278.

character or to the quality of the goods, and such reference as the use of the two syllables of the word "motor" in the word "motorine" has to the character or quality seems to me not to be that direct reference which the Act contemplates. I think, therefore, that the word "motorine" is a word which has no direct reference to the character or quality of the goods. It comes, therefore, within sub-s. 4 of s. 9, and is one which is capable of being registered. If I had come to the opposite conclusion, I think the applicants would have been in a difficulty, because if "motorine" has a direct reference to the character or quality of the goods, for precisely the same reason it seems to me the word "motricine" would have a direct reference to the character or quality of the applicants' goods. But I come to the conclusion that the word "motorine" is properly registered, and cannot be struck off the register. The application fails on both heads, and I must refuse it with costs.

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Cave, K.C., applied for a certificate under s. 46 of the Act of 1905 that the validity of the registration of the opponents' trade mark came into question in the proceedings.

WARRINGTON J. granted the application.

Solicitors: *G. B. Ellis; Wilson, Bristows & Carpmael.*

W. I. C.

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July 16, 17.

In re CRAVEN'S MORTGAGE.

DAVIES *v.* CRAVEN.

[1907 C. 1917.]

Revenue—Income Tax—Mortgage—Interest at 5 per Cent. per Annum payable in Lump Sum at uncertain Date—Deduction of Income Tax—“Yearly Interest”—Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 40—Revenue (No. 1) Act, 1864 (27 & 28 Vict. c. 18), s. 15.

By a mortgage of June 1, 1888, the mortgagor covenanted that on his death or on his son's death, whichever event should first happen, he, his executors, administrators or assigns, would pay to the mortgagee the principal sum secured, together with simple interest thereon at the rate of 5 per cent. per annum reckoned from August 10, 1887, up to the time of such death, and, if the aggregate amount of this sum and interest or any part thereof should not then be paid, would pay interest on the unpaid part by equal half-yearly payments. The mortgagor predeceased his son and died in 1906. His executor paid to the mortgagee interest on the aggregate sum, consisting of principal and interest found due at the mortgagor's death. He now proposed to pay off the aggregate amount due on the mortgage, and claimed the right in doing so to deduct income tax on so much of the aggregate sum as represented interest:—

Held, that the interest had not been capitalized by the contract between the parties; that, inasmuch as the interest was calculable by the year, it was “yearly interest” within s. 40 of the Income Tax Act, 1853, although it was payable in a lump sum at an uncertain date; and that the mortgagor's executor was entitled to deduct income tax.

Bebb v. Bunny, (1854) 1 K. & J. 216, followed.

Goslings & Sharpe v. Blake, (1889) 23 Q. B. D. 324, distinguished.

ADJOURNED SUMMONS.

By a mortgage dated June 1, 1888, and made between W. G. Craven (the mortgagor) of the first part, George Bonner of the second part, and Samuel Lewis (the mortgagee) of the third part, after reciting that Craven was on August 10, 1887, indebted to Lewis in the sum of 18,042*l.* 10*s.* 4*d.* (part of a larger sum), and that, Craven having been pressed but being unable to pay the same, it had been agreed by a memorandum of August 10, 1887, that payment should be postponed, it was witnessed “that

in pursuance of the said agreement in this behalf and in consideration of the said sum of 18,042*l.* 10*s.* 4*d.* so owing as aforesaid and of the premises The said W. G. Craven doth hereby covenant with the said S. Lewis that he the said W. G. Craven his executors administrators or assigns will on the death of him the said W. G. Craven or his son the said Augustus William Craven whichever event shall first happen pay to the said S. Lewis his executors administrators or assigns the sum of 18,042*l.* 10*s.* 4*d.* together with simple interest thereon at the rate of 5 per cent. per annum reckoned from the 10th day of August 1887 up to the time of such death and if the aggregate amount of such sum and interest or any part thereof shall not then be paid then and in such case and so long as the same aggregate sum or any part thereof shall remain unpaid will pay to the said S. Lewis his executors administrators or assigns interest for the said aggregate sum or for the unpaid part thereof for the time being at the rate of 5 per cent. per annum by equal half-yearly payments the first of such payments to become due and be made at the expiration of six calendar months from the death of the said W. G. Craven or Augustus William Craven whichever event shall first happen and will make all the said payments hereinbefore covenanted to be made without any deduction whatsoever," and W. G. Craven and Bonner (as trustee) granted and assigned to Lewis certain real estate and policies of life insurance as security. Lewis died on January 13, 1901. W. G. Craven predeceased his son, and died on January 2, 1906. At that date the principal sum due on the mortgage amounted to 16,542*l.* 10*s.* 4*d.*, and the simple interest thereon at 5 per cent. per annum from August 10, 1887, calculated on the principal amount from time to time owing on security of the mortgage, amounted to 15,937*l.* 4*s.* 10*d.*, without making any deductions for income tax or otherwise. These sums were not paid; but W. G. Craven's executor paid to Lewis's executors interest at 5 per cent., deducting income tax, on the aggregate amount of 32,479*l.* 15*s.* 2*d.* He now proposed to pay off the aggregate amount due on the mortgage, but he claimed the right in doing so to deduct the income tax on the 15,937*l.* 4*s.* 10*d.* which represented interest. Lewis's executors did not feel justified

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WARRINGTON J. in allowing the claim, and took out this summons for the determination of the question.

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H. Terrell, K.C., and E. S. Ford, for the mortgagee's executors. The respondent is not entitled to deduct income tax on the interest which was payable at the death of W. G. Craven. It is no longer interest; it is capital, and cannot be treated as a yearly payment of interest within s. 40 of the Income Tax Act, 1853, which provides that "every person who shall be liable to the payment of any rent, or of any yearly interest of money, or any annuity or other annual payment, either as a charge on any property or as a personal debt or obligation by virtue of any contract, whether the same shall be received or payable half-yearly or at any shorter or more distant periods, shall be entitled and is hereby authorized, on making such payment, to deduct and retain thereout the amount of the rate of duty which at the time when such payment becomes due shall be payable under this Act. . . ." That that section refers only to interest which is payable yearly is shewn by s. 15 of the Revenue (No. 1) Act, 1864. In the present case no interest was payable yearly. Before the death of W. G. Craven no interest at all was payable. On his death a debt consisting of principal and interest was due from his estate to the mortgagee, and interest then became payable on the whole of that debt. Therefore by the express terms of this contract the whole fund was capital at his death, and income tax cannot be deducted from any part of it: *Leeds Permanent Benefit Building Society v. Mallandaine* (1); *Secretary of State in Council of India v. Scoble*. (2) Even if the 15,937*l.* 4*s.* 10*d.* ought to be treated as interest, it was payable in a lump sum, and income tax cannot be deducted from interest which is not payable yearly: *Goslings & Sharpe v. Blake*. (3) We do not rely on the words "without any deduction whatsoever."

Cordery, for W. G. Craven's executor. We are entitled to deduct income tax on the interest which became due on W. G. Craven's death. The mortgage deed did not effect a capitalization of that interest in any sense which would discharge the

(1) [1897] 2 Q. B. 402.

(2) [1903] A. C. 299.

(3) 23 Q. B. D. 324.

covenant to pay interest. It only provided that after a certain event that interest should itself carry interest. There is no further covenant to pay the aggregate sum. To recover the interest included in the aggregate sum the mortgagee's executors would have to sue us on the covenant to pay simple interest on the 18,042*l.* 10*s.* 4*d.* There is no authority for the proposition that where principal and interest are mixed together they must both be treated as capital, and *In re Middlesborough, &c., Building Society* (1) is a decision to the contrary. The judgment of the Court of Appeal in *East Indian Ry. Co. v. Secretary of State in Council of India* (2) recognizes the same principle.

The only substantial question in this case is whether the interest payable under the covenant in the mortgage to pay simple interest till the death of W. G. Craven is within s. 40, and we submit that it is. The interest is calculated by the year, and is payable at a "shorter or more distant period," according to the date of the death of W. G. Craven or his son. The point is covered by the decision in *Bebb v. Bunny*. (3) That was a question of interest on purchase-money where the sale had not been completed on the day fixed by the contract, and Wood V.C. held, in circumstances very like the present, that income tax could be deducted because the interest was calculable by the year. It is only reasonable that a purchaser should be allowed to do so, for he takes the rents of the property, and income tax is deducted from them by the tenants. That consideration applies in the case of a mortgagor also. We ought not to be made to pay the tax twice over. The Crown has already been paid out of our rents, so we are entitled to deduct the income tax and retain it: *Mosse v. Salt* (4); *London County Council v. Attorney-General*. (5) *Bebb v. Bunny* (3) was not overruled or doubted in *Goslings & Sharpe v. Blake* (6), where it was again said that the question depended on whether the interest was calculable by the year. The exact amount to be deducted will be fixed by the rates payable at different times during the period when it was accruing: s. 15 of the Revenue (No. 1) Act, 1864.

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(1) (1885) 53 L. T. 492.

(2) [1905] 2 K. B. 413.

(3) 1 K. & J. 216.

(4) (1863) 32 Beav. 269, 276.

(5) [1901] A. C. 26.

(6) 23 Q. B. D. 324.

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H. Terrell, K.C., in reply. The respondent cannot retain the income tax. There is no question of his being called upon to pay income tax twice; the interest was not due till the death of W. G. Craven, so the amounts deducted from the rents before that date had nothing to do with the interest, and he has not paid income tax on it. Even if he has paid it, the result of his retaining the income tax now will be that we shall have paid it all, and he will have paid nothing. The decision in *Bebb v. Bunney* (1) was really that to come within s. 40 interest must be payable yearly as well as calculable yearly. That was the view taken of it in *Goslings & Sharpe v. Blake*. (2)

WARRINGTON J. stated the facts and read s. 40 of the Act of 1853, and proceeded: In my opinion this case is directly covered by authority, but before referring to the authorities I should like again to refer to the Act. The words of s. 40 are, "any yearly interest of money, or any annuity or other annual payment, either as a charge on any property or as a personal debt or obligation by virtue of any contract, whether the same shall be received or payable half-yearly or at any shorter or more distant periods." Now, what is the meaning of simple interest at 5 per cent. per annum reckoned from a past date, a date nearly a year before the execution of the deed, and to be paid at an uncertain date after the execution of the deed? It seems to me to mean this. It means interest at so much per cent. per annum for every year which may elapse from August 10, 1887, until the death of W. G. Craven; and the deed distinctly contemplates that the loan may go on for more than a year from 1887, and that interest may have to be calculated for an uncertain number of years beginning from August 10, 1887. If that is so, does the case come within the principle of one or other of the two authorities *Bebb v. Bunney* (1) or the more recent case of *Goslings & Sharpe v. Blake*? (2)

I will deal with *Goslings & Sharpe v. Blake* (2) first, because I cannot help thinking that there was some misapprehension of that case when it was referred to yesterday. The question in that case was this. When a banker makes a loan for a short

(1) 1 K. & J. 216.

(2) 23 Q. B. D. 324.

period in the course of his business, say, a month or twenty-four hours, and is to be repaid with interest calculated at a yearly rate of so much per cent. per annum, is that interest a "yearly interest of money or any annuity or other annual payment" within s. 40? What the Court of Appeal really did in that case was to hold that the transaction was a commercial transaction wholly apart from an ordinary mortgage transaction or a covenant to pay interest for a period which might last for more than a year. That is apparent from all the judgments, and especially from that of Lord Esher M.R., whose judgment was relied on by the plaintiffs. He reads the material part of the section, and says this (1): "Dealing with this according to ordinary English idiomatic language, I think that the word 'other' obliges us to say that an annual payment is an instance of the same kind as those that have gone before, so that what have gone before are in the nature of annual payments, but besides those there are other annual payments which may be brought in. If that is so 'any rent' becomes 'any annual rent.' 'Any yearly interest of money' surely cannot be interest for less than a year in ordinary English, and there remain 'any annuity,' which is admitted to be an annual thing, and any 'other annual payment.' Those are the only cases in which the deduction allowed by the 40th section may be made from interest." He then points out that the lending of 1000*l.* for three months with interest calculated at 12 per cent. per annum is nothing more than the mercantile mode of expressing "You shall pay to me at the end of three months 1000*l.* and also 30*l.* for interest." The 30*l.* payable at the end of three months is really compensation for or the price paid for the accommodation. He points out that it is the same thing as saying that at the end of three months you are to repay the 1000*l.* "and 30*l.* more for the use of it," or 1000*l.* "with interest at the rate of 12 per cent."; that these are all different ways of expressing the same thing, but that there is nothing like an annual calculation of interest, because it was the intention of the parties that the transaction should not last for a year. At the end of his judgment he shews that he only intends it to apply to mercantile transactions, for he says (2): "That a man who

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borrow money for twenty-four hours should be allowed to deduct the income tax in respect of such a loan, would, it seems to me, in the multitude of transactions which take place in the City every day, render business impossible, and render the Government utterly helpless with regard to the tax. I cannot think that that was the intention of the Act of Parliament or of the Legislature." He also points out in a previous part of his judgment that *Bebb v. Bunny* (1) is distinguishable. Lindley L.J. is equally clear in his judgment that their Lordships' decision was not intended to have any effect on mortgage transactions. He contrasts an ordinary mortgage with a short loan, and says (2): "In point of business, therefore, a mortgage is not a short loan; but a banker's loan at three months is a totally different thing. That is a short loan, it is intended and understood to be a short loan, and the difference in practice between the two is perfectly well known to every business man. Now what we are dealing with here are short loans by bankers. We have nothing to do with the practice of the Court of Chancery as to the mode in which it pays the creditors against an estate, on a bill of exchange, or otherwise. We have nothing to do with the practice between vendors and purchasers." In making that remark he is thinking of *Bebb v. Bunny*. (1) Bowen L.J. said much the same thing, and I read a portion of his judgment as shewing that there was no intention to question the authority of *Bebb v. Bunny*. (1) He says this (3): "It seems to me it is not yearly interest at all; it is not calculated with reference to a year in any sense, although it is true that it is expressed in a notation which is borrowed from the language of cases where there are yearly loans, or where the interest is calculated by the year. It is convenient to express in that notation the amount of interest that has to be paid, but it is not calculated on a year, nor on the supposition that the loans would last for a year, therefore it is not yearly interest. When it runs over, then the interest becomes payable during the times it runs over it, and is calculable with reference to the time it is outstanding, and the case may there be different. If this view is right we are not overruling what was said in *Bebb v. Bunny*. (1) The

(1) 1 K. & J. 216.

(2) 23 Q. B. D. 330.

(3) 23 Q. B. D. 331.

Vice-Chancellor there expressly confines his judgment to interest at a yearly rate which may have to be paid *de anno in annum*, such as interest on purchase-money or mortgage interest, and the only ground on which I differ respectfully from the Court below is that they seem to think that *Bebb v. Bunny* (1) necessarily governs this case. I do not think it does so, but that it applies to other cases of a different kind." I think where he speaks of interest which may have to be paid *de anno in annum* he does not mean to confine it to money which is payable at the end of yearly periods. He is really borrowing language of *Wood V.-C.* which was intended to apply to interest payable at any time, but which was calculated *de anno in annum*.

Now I turn to the case of *Bebb v. Bunny* (1), which I think is directly in point; and I cannot see my way to decide the present case in favour of the plaintiffs without at least expressing disapproval of *Bebb v. Bunny*. (1) In that case a purchaser entered into a contract for the purchase of real estate, a date was fixed for completion, and the contract contained the ordinary stipulation that, if he did not complete on that day, he would whenever he did complete pay interest on the purchase-money for the period between the date fixed by the contract for completion and the date of the actual completion. Assuming that the clause was in common form, that interest was to be paid at the rate of 5 per cent. *per annum*. In all essentials that was exactly the same as the present case. It was a contract to pay a fixed sum at a certain date, and, if that did not take place, to pay it with interest at 5 per cent. *per annum* at an uncertain date. It matters not that that date was in *Bebb v. Bunny* (1) fixed by the completion of the contract and in the present case by a man's death; it was an uncertain event which might occur after a longer period than a year. In that case the purchaser was held to be entitled to deduct income tax from the interest. It was heard in chambers and adjourned into Court, so it was carefully considered, and Sir W. Page Wood V.-C., after referring to the Act of 1853, says (2): "With the view to resolve my own doubts, I have, in addition to the assistance to be derived from the cases cited, endeavoured to ascertain what has been the practice of the

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Inland Revenue Office. It appears never to have been doubted, that, under s. 40, the tax upon interest on mortgages should be deducted ; and that in practice the mortgagor, in all cases, deducts the tax. And I have been told, by the authority above referred to, that prosecutions have been instituted against mortgagees to recover the penalty for refusing to allow such deductions, and that such penalty has been paid without proceeding to trial. Now a mortgage deed rarely, if ever, reserves a yearly interest. Most mortgage deeds contain only a covenant to pay the principal, with interest at a certain rate per annum, on a day certain. After that, it accrues *de die in diem*, and the interest, without any particular reservation, ordinarily is received half-yearly, from year to year. It is difficult to see the distinction between interest so reserved and paid, and that which by special agreement accrues on purchase-money, which also goes on from day to day, and may run on for a year, or stop at any time on payment of the purchase-money, and which, in some shape or other, forms a lien on the property." Pausing there for a moment, what the Vice-Chancellor says about the form of mortgage deeds is not applicable to the common forms of mortgages at the present day, for most mortgages now contain an express covenant to pay the interest half-yearly. But I do not think it makes any difference whether there is an express covenant or an implied liability. Then, after referring to some authorities, the learned judge goes on (1): "The whole difficulty is in the expression 'yearly' interest of money ; but I think it susceptible of this view, that it is interest reserved, at a given rate per cent. per annum ; or, at least, in the construction of this Act, I must hold, that any interest which may be or become payable *de anno in annum*, though accruing *de die in diem*, is within the 40th section. I cannot make any solid distinction between interest on mortgage money and interest on purchase-money. The case has been very well argued, and it was chiefly in reference to the point made on the part of the vendor as regards Schedule D, that I referred to the authorities of the Inland Revenue Office, who say that this schedule was framed more particularly in reference to the case of public bodies, such as parochial boards,

(1) 1 K. & J. 219.

who have no income out of which interest is payable, and are not assessed to the duty, and, having to pay interest on bonds or the like, are not, therefore, parties entitled to deduct the tax under s. 40; so that the tax becomes payable by the receiver of the interest under Schedule D. I consider the Act very singularly worded, yearly interest being used apparently in the same sense as annual payments; but I am clearly of opinion that it means at least all interest at a yearly rate, and which may have to be paid *de anno in annum*; such as interest on purchase-money, as well as mortgage interest; and that, therefore, the purchaser is entitled to deduct the tax in this case. In fact, if this interest be not subject to such deduction, I do not well see how it can be charged with the tax at all." It has been argued that when the Vice-Chancellor says "*payable de anno in annum*" he means to confine his judgment to cases where the interest has to be paid at the end of yearly periods; but he plainly cannot mean that, for interest on purchase-money is not payable from year to year, but when the purchase-money is paid on actual completion. I think he means interest which may become payable at a future date and is calculable by periods of not less than a year. Therefore *Goslings & Sharpe v. Blake* (1) is not inconsistent with *Bebb v. Bunney*. (2) *Goslings & Sharpe v. Blake* (1) is confined to short loans for periods of less than a year, and *Bebb v. Bunney* (2) applies where interest is reserved for a period of more or less than a year, but is calculable by periods of a year. That is the case here. This is interest for so many years as W. G. Craven or his son shall survive, calculated at 5 per cent. per annum; and it seems to me, both on the construction of s. 40 apart from authority, and on the authority of *Bebb v. Bunney* (2), to be a yearly payment from which the respondent is entitled to deduct interest.

Then there is one word I have to say on the question of capitalization. It was argued that even if the interest before the death of W. G. Craven was within s. 40, it then ceased to be so, and became capital and itself liable to pay interest—in other words, that there was a contract that it should be capital. I do not think so. I find nothing in that deed to capitalize the

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WARRINGTON J. interest or to change the character of the interest and make it something which it was not before. In order to recover this interest the executors of the mortgagee would have to sue the mortgagor's executor on the covenant for payment of interest. The effect of the last clause of the covenant is only that if the principal and interest is not paid at the right time the unpaid interest is itself to bear interest. There is no capitalization.

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The respondent is entitled to deduct the income tax at the varying rates of each year from 1887, in accordance with s. 15 of the Revenue (No. 1) Act, 1864, and he will also deduct his costs of this summons.

Solicitors: *A. E. Sydney ; Burgess, Taylor & Tryon.*

H. C. R.

WARRINGTON J. *In re* BULAWAYO MARKET AND OFFICES COMPANY,
 LIMITED.

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[00180 of 1907.]

Company—Director—Appointment of Limited Company—Ultra vires—Winding-up—Alteration of Constitution of Company—"Just and equitable"—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 79, sub-s. 5.

A company registered under the Companies Act, 1862, need not have any directors, and there is nothing in the Companies Acts prohibiting the appointment of a limited company as a director or manager of another company.

PETITION.

The Bulawayo Market and Offices Company, Limited, was registered on July 23, 1897, with a capital of 135,000*l.*, divided into 135,000 shares of 1*l.* each.

The articles of association of the company contained the usual provisions relating to the appointment, rotation, retirement, proceedings, powers, restrictions and disqualification of directors.

Article 128 was as follows: "The directors may from time to time and at any time appoint any persons to be managers of the company, either for a fixed term or without any limitation as to

the period for which such managers are to hold office, and generally on such terms and conditions as the directors may think expedient, and subject to the terms of any contract with such managers, may from time to time and at any time remove or dismiss such managers from office and appoint others in their place, and the directors may from time to time fix the remuneration to be paid to such managers, and such remuneration may be by way of salary, or commission, or participation in profits, or by all or any of such modes, and the directors may from time to time entrust to and confer upon such managers for the time being such of the powers, authorities and discretions exercisable under these presents by the directors (including if thought fit power to use the seal) as they think fit, and may confer such powers for such time and to be exercised for such objects and purposes and upon such terms and conditions and with such restrictions as they think expedient, and may confer such powers either collaterally with or to the exclusion of, or in substitution for, all or any of the powers of the directors in that behalf, and may from time to time revoke, withdraw, alter or vary all or any of such powers, and the directors may empower such managers to sub-delegate all or any of the authorities, powers and discretions for the time being delegated to them, and if thought fit any such appointment may be made in favour of any company or the directors or managers for the time being of any company or the members for the time being of any firm or otherwise in favour of any fluctuating body of persons whether nominated directly or indirectly by the directors."

At meetings of the company held on January 28 and February 25, 1907, special resolutions were duly passed and confirmed with reference to the reduction of the capital of the company and to the appointment of directors.

Resolution 2, so far as it is material, was as follows: "That article 128 of the articles of association of the company be struck out and the following substituted therefor:—

" ' *Management.*

" ' 128. Until otherwise determined by the company in general meeting, there shall be no directors of the company, but the

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control of the company and the management of its business in Bulawayo and London shall be vested in a manager or managers, and such manager or managers may exercise all such powers of the company and do, on behalf of the company, all such acts as may be exercised and done by the company and as are not by statute or by these articles required to be exercised or done by the company in general meeting. Whenever, under these articles, the directors are required or authorized or are given a discretion to do or not to do any act, then, as the case may be, the managers shall or shall not do or shall be empowered to do such act.'

“‘128A. The first managers of the company shall be the Rhodesia Exploration and Development Company, Limited, who shall (until directors have been appointed) hold office so long as they shall be able and willing to act. A subsequent manager or managers shall be appointed by the company in general meeting.’”

The present petition was presented by a shareholder holding five fully paid-up shares of 1*l.* each (which had recently been reduced to five fully paid-up shares of 5*s.* each), and asked for the compulsory winding up of the company.

The petitioner alleged that the resolution was an attempt to make an improper change in the fundamental constitution of the company so far as the entire management of its business was concerned, and to deprive the shareholders of the rights and protection given them by statute, and in fact to remove the substratum of the company so far as management by directors and the liabilities and responsibilities of directors were concerned; that, having regard to the provisions of the Companies Acts, it was contrary to public policy and to the law relating to the management of limited companies for a company constituted with a board of directors to dispense with directors and to substitute a company with limited liability for individual directors with unlimited liability, especially when shares had been subscribed for and taken by the public on the footing of regulations which provided for the management of its affairs by individual directors subject to the provisions of the statutes relating to the duties and liabilities of directors; and that in the

circumstances it was just and equitable that the company should be wound up. WARRINGTON J.

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Hughes, K.C., and *H. Greenwood*, in support of the petition. If the resolution passed and confirmed by the company is valid the result will be that the shareholders will be deprived of the protection arising from the responsibility of individual directors contemplated by the Companies Acts. BULAWAYO MARKET AND OFFICES COMPANY, LIMITED, *In re.*

[WARRINGTON J. Do you say that it is an essential condition of the Companies Acts that a company should be managed by directors?]

Yes; there is no recorded instance of a limited company having been appointed sole director of another company. It is submitted that it is *ultra vires* the company to adopt this scheme. The criminal provisions of the Companies Act, 1862, would be rendered futile in case no individual directors were appointed.

[WARRINGTON J. referred to s. 67 of the Companies Act, 1862.]

That section contemplates the case of a small company in which the shareholders can manage the business without delegation. Our objection is that a limited company is made sole director. A director, it is submitted, means a person, and does not include a company. A limited company has neither intelligence, discretion, a capacity to be punished, nor a conscience. The persons who manage a company must be individuals. There is no provision in the Companies Acts which contemplates that a company can be a director of another company.

[WARRINGTON J. Sects. 49 to 61, which are headed "Provisions for Protection of Members," do not mention directors.]

No, but those provisions were found insufficient for the protection of members, and the Acts of 1890 and 1900 have since been passed for their protection. Those Acts not only contemplate and refer to directors who are clearly regarded as individuals, but would in some respects be quite unworkable if directors were not individuals. It is difficult to see how a limited company could be made liable for misfeasance under s. 10 of the Companies (Winding-up) Act, 1890, which superseded s. 165 of the Act of 1862. A limited company could not suffer a term of imprisonment.

WARRINGTON J. [WARRINGTON J. referred to s. 165 of the Act of 1862.]
 But a limited company could not be punished under
 1907 ss. 166—168.

BULAWAYO [WARRINGTON J. referred to s. 6 of the Act of 1862 and to
 MARKET AND BUCKLEY on the Companies Acts, 8th ed. pp. 8 and 88. Cannot a
 OFFICES limited company be a person for the purposes of that section ?]
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A limited company can no doubt hold shares in another company, but there is no authority for the proposition that it can be one of the first subscribers of a memorandum of association, unless there are besides seven individuals. A limited company cannot furnish returns as to allotments under s. 7 of the Act of 1900. The report required by s. 12 must be certified by two directors: see also s. 9. A limited company cannot act as a director except through an agent. The Directors' Liability Act, 1890, throughout speaks of directors and intending directors as persons. It is difficult to apply the words "without his authority or consent" in s. 3 to the case of a limited company: see also s. 5. A limited company acting as a director cannot be publicly examined under the Companies (Winding-up) Act, 1890, s. 8, sub-s. 3. Both the Directors' Liability Act, 1890, and the Companies (Winding-up) Act, 1890, would be difficult to work if a company were to be allowed to be a sole director.

Apart from the question of ultra vires, it is submitted that, except in the case of a company which originally starts without directors, it is not competent for a majority to take from a minority of the shareholders the protection afforded them by the articles of having directors. Further, the removal by the resolution from the shareholders of all control over the management of the company's affairs is so vital a change in the constitution of the company that it is virtually equivalent to the taking away of its substratum, and, that being so, it is, it is submitted, "just and equitable" that the company should be wound up. The stringency of the ejusdem generis rule has recently been considerably relaxed: *In re Amalgamated Syndicate*. (1)

Jenkins K.C., and *J. W. M. Holmes*, for the company, and
W. H. Draper, for opposing creditors, were not called upon to argue.

WARRINGTON J. stated the facts, and continued :—The ground on which the petition is presented is that the resolution is ultra vires the company. It is said that it is equally contrary to the constitution of the company, and a thing the company cannot by any means do, to appoint a limited company as its sole manager. I do not care whether it is called “director” or “manager”—that does not matter. And it is further argued that it is just and equitable to wind up this company because a majority of the shareholders have, by passing this resolution, endeavoured to take away what is said to be the privilege of the minority, of having individual persons, and not a company, to look to as liable to them as directors.

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With respect to the contention that what is purported to be done is ultra vires, there is really nothing to support it. The Act of 1862 contains certain provisions headed “Provisions for Protection of Members.” There is not a word in those provisions which in any way indicates that the Legislature at any time thought it was essential that there should ever be directors of a company at all, much less that the company should not be managed by a single director who might or might not be, as the case might happen, a limited company. There is nothing, therefore, in the original Act which in any way makes it incumbent on a company either to have directors at all or to have directors who shall be individual persons and responsible as individuals to the shareholders. So far there is nothing material in the Act of 1862, except that s. 67 seems to contemplate that there might be cases in which there might be no directors at all.

Then, with regard to the subsequent Acts, no doubt there are provisions in them which assume that, according to the usual practice as it has been developed since limited companies were known, directors would be individuals; but even in those Acts, and even though it might be difficult to fit in their provisions if the usual practice were departed from and limited companies were appointed directors, there is nothing which I can see that indicates an enactment to the contrary or an intention that the directors should not be limited companies. I can find nothing, therefore, in the Acts under which these companies are formed

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which renders it ultra vires the company to have another company as sole manager, or to have no directors at all.

The second argument which has been used is that in the case of an existing company which originally starts with directors it is just and equitable to wind it up if the majority required by s. 51 of the Act of 1862 seek to alter the regulations by removing the protection afforded by individual directors. A complete answer to that is to be found in this. A person takes shares in a limited company subject to the possibility of the regulations of the company being altered in the manner prescribed by the Act of 1862, namely, by special resolution; that is one of the conditions on which he applies for shares, and if any such argument as that to which I am referring could be applied to any company, it certainly is hardly applicable with any force to this company, having regard to article 128 of the original articles. That article enabled the directors, even without a resolution of the company, to put the whole management of the company into the hands of some manager "to the exclusion of, or in substitution for, all or any of the powers of the directors in that behalf." The very constitution of the company therefore enabled the directors to divest themselves of all powers and responsibilities in the management of the company, and to put it into the hands of some other person as manager.

It seems to me, therefore, that neither of these grounds affords any reason for winding up the company, and consequently I dismiss the petition with costs.

Solicitors: *Hyman Isaacs & Lewis; Ingle, Holmes, Sons & Pott; Pritchard & Sons.*

W. I. C.

In re DARBY'S ESTATE.
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[1907 D. 908.]

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July 24.

Mortgage—Voluntary Assignment of Part of Property Comprised in Mortgage—No Covenants for Title, express or implied—Paramount Charge—Administration of Assignor's Estate—Payment of Mortgage Debt by Executors—Liability of Assignee to contribute.

An assignor deposited with his bankers the title-deeds of certain leasehold premises together with a policy of assurance on his own life and certain dock warrants, and executed a deed of charge and memorandum of deposit to secure the payment of the balance for the time being due on any accounts he might have with the bank. He subsequently, by a voluntary deed, assigned the leasehold premises to his wife. The deed contained no reference to the charge and memorandum of deposit, and no covenants for title, express or implied. By his will he gave all his property to trustees upon trusts for the benefit of his wife and children. On the death of the assignor his executors paid off the debt due to the bank. On an application to the Court for the determination of the question whether the widow, as assignee of the leaseholds, was liable to contribute to the payment of the debt:—

Held, that the charge being one created by the assignor himself, and not a charge paramount to his own title, the widow was under no liability to contribute.

Ker v. Ker, (1869) Ir. R. 4 Eq. 15, explained and distinguished.

In re Jones, [1893] 2 Ch. 461, distinguished.

ORIGINATING SUMMONS.

On various occasions prior to November 13, 1897, Thomas Henley Darby deposited with his bankers, the Kingsland Branch of the London and County Banking Company, Limited, certain dock warrants and a policy of assurance on his own life, and executed memoranda of charge charging them with the payment of the balance for the time being due on any accounts he might have with the bank.

On November 13, 1897, he deposited with his bankers the title deeds of a certain leasehold messuage, No. 157, Ladbroke Grove, Notting Hill, in the county of Middlesex, and executed a deed of charge whereby he declared that the title deeds were deposited as a security for the payment of all moneys for the time being owing from him to the bank on any account

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whatsoever, and undertook to pay to the bank on demand such of the said moneys as should for the time being be actually due to them, and he thereby charged his whole estate and interest in the leasehold premises with payment of such moneys, and undertook that he and all necessary parties (if any) would upon request execute to the said bank a legal mortgage of the said premises thereby charged, and he declared that in the meantime the bank should be deemed mortgagees of the said premises and should have all such powers as by statute should for the time being be exercisable by a mortgagee by deed as therein mentioned.

T. H. Darby made his will, dated September 4, 1899, and thereby appointed W. Rendall, his wife Margaret Darby, and his son T. L. Darby executors and trustees thereof, and after various pecuniary and specific bequests gave and bequeathed his real estate (if any) and the residue of his personal estate unto his trustees upon trust for conversion and investment, and after providing for a certain annuity thereby given, to pay the balance of the income to his wife for her life, and after her decease upon trust to divide the corpus among all his children in equal shares.

By a deed of assignment, dated April 3, 1903, and made between T. H. Darby of the one part and his wife of the other part, after reciting the lease of the premises No. 157, Ladbroke Grove, and that the assignor in order to make some provision for his wife had determined to execute the present deed, it was witnessed that in consideration of the natural love and affection which the assignor had for his wife he thereby assigned unto her the premises for all the residue of the term granted by the lease less the last day thereof, subject to the rent thereby reserved and the covenants and conditions therein contained, and subject also to, but with the full benefit of, any existing underlease or tenancy agreement in respect of the premises. The deed contained no covenants for title by the assignor, express or implied, nor any reference to the deed of charge of November 13, 1897, nor to the mortgage by deposit of the title deeds of the leasehold premises.

T. H. Darby died in October, 1906.

At the date of his death there was owing to the bank the sum of 658*l.* 3*s.* 11*d.* By request of the executors the bank had realized the life policy, and with a cheque for the balance from the executors had repaid themselves the amount due to them from the testator.

The present summons was taken out by W. Rendall, one of the executors, for the determination of the question (inter alia) whether, in the events which had happened, the widow, as assignee of the leasehold premises, ought to bear any and what proportion of the mortgage debt due from the assignor under the deed of charge and memorandum of deposit of November 13, 1897.

C. M. Pitman, for the summons.

J. G. Joseph, for the widow of the assignor. The widow is not liable to contribute to the payment of any part of the mortgage debt. *Ker v. Ker* (1) is distinguishable on two grounds. In that case (1.) the assignment was purely voluntary, and (2.) the charge was a paramount charge, that is to say, the property was acquired by the testator burdened with the charge. Here the assignment of the leasehold property was not voluntary, inasmuch as the assignee took it subject to the obligations of paying the rent and observing the onerous covenants contained in the lease.

The debt in this case is a debt created by the testator himself, in respect of which he was personally liable. Had he paid the debt during his lifetime he could have had no equity to call upon the assignee to contribute, and volunteers under his will are in no better position, for, as has been said, "the heir sits in the seat of his ancestor." The suggested distinction is clearly indicated in *Ker v. Ker* (1), and especially in the judgment of Christian L.J., which is a compendium of the law upon this subject.

A. L. Morris, for the children of the assignor. In *Ker v. Ker* (1) the judgment of Lord O'Hagan L.C., which is the leading judgment, is entirely based on the fact that the deed in that case contained no covenant against incumbrances. The Lord Chancellor makes no reference to the fact that the debt in question was not the settlor's own, and the decision was interpreted by North J. in *In re Jones* (2) as being based on the

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(1) Ir. R. 4 Eq. 15.

(2) [1893] 2 Ch. 470, 473.

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absence of a covenant against incumbrances. On principle it makes no difference whether or not the debt is the settlor's own. In either case he can if he chooses give a covenant against incumbrances, and if he does not do so the presumption is that he gives the property subject to the existing liability.

All the parties here are volunteers, and ought to bear the common burden equally. If the bank had exercised their right against the leaseholds, the widow, the assignee, would, in the absence of any covenant against incumbrances, have had no right to recover anything but contribution from the settlor.

WARRINGTON J. stated the facts, and continued :—The question in this case is whether the widow, the assignee, is liable to be called upon by the executors of the assignor to contribute to the payment of the debt to his bankers, which they have been called upon to pay and have paid. In order to establish a right to contribution it is incumbent upon the executors to shew that they have an equity to call upon the assignee to contribute to the debt which is their debt alone. The debt is the debt of the assignor, and they as his executors are bound to pay it. It is contended, however, that the executors are entitled to contribution from the assignee. Is there any authority for that proposition? It seems to me that there is not. The only authority which has been cited, *Ker v. Ker* (1), is, if anything, against it. There the grantor was in the same position as the assignor in the present case. He was seised of certain real estate which was subject to a charge not created by himself. By a voluntary deed which contained no covenant against incumbrances he conveyed part of the real estate to a certain person, and by his will he devised the remainder of it to other persons. On the death of the grantor the question arose whether the grantee under the voluntary deed was liable to contribute to the payment off of the paramount incumbrance, *i.e.*, the incumbrance which was paramount to the title of the grantor himself. The case came before Lord O'Hagan L.C. and Christian L.J. on an appeal from the Master of the Rolls, and both those learned judges held on the facts in that case that the voluntary grantee was liable to contribute

(1) Ir. R. 4 Eq. 15.°

to the payment off of the paramount incumbrance. The reasons for this decision are stated most elaborately and clearly in the judgment of Christian L.J. Lord O'Hagan L.C., in giving judgment, referred to the fact that the incumbrance in question was a paramount incumbrance, but it cannot be said that it distinctly appears from his judgment that that fact formed the basis of his decision. I think it did, otherwise he would have disagreed with some of the statements in the judgment of Christian L.J., who followed him. I think, however, that there is no doubt whatever that Christian L.J. based his judgment on the ground that that incumbrance was a paramount incumbrance, and that if that was not the ground his judgment would have been different. He states the law upon the subject with great elaboration, and, after dealing with the authorities in detail and stating that the original principle of the common law was equality of contribution, he proceeds to mention the difference which appeared in the old authorities in a case where the incumbrance was not a paramount charge to the grantor's own title. He says (1): "But now comes a distinction which is very noteworthy in the present case. If the conuzor of the recognizance or judgment, after making those several grants to purchasers, himself still retained a part of his lands, and the conuzee extended that part, neither he nor his heir-at-law had any right of contribution at all against the purchasers, but must have borne the whole; and furthermore, which begins to come very near us here, it made no difference in that respect whether the purchasers were purchasers for value or for no consideration at all." He then refers to *Harbert's Case* (2), and he thus sums up (3): "Thus it clearly appears that the reason why the grantor, in respect of his retained lands, was excepted out of the principle of equality which existed between the purchasers from him, irrespective of their priorities, was solely that he was himself the debtor and liable to execution against person and goods. Therefore when that reason does not exist at all, where the incumbrance is a paramount charge, operated with which all the estates originally came to the grantor, the case seems restored to the principle of equality, and the grantor, according to the

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(1) Ir. R. 4 Eq. 26.

(2) (1584) 3 Rep. 11b.

(3) Ir. R. 4 Eq. 27.

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law of *Harbert's Case* (1), would have the same right against the purchasers from himself which they had inter se, i.e., to resist the proceeding of the incumbrancer till he brought all in to share the common burthen." He repeats again, in a compendious form, the conclusions which he derives from *Harbert's Case*. (1) He says (2): "The conclusions which I gather from *Harbert's Case* (1) are the following: First, that the original principle of the common law was *equality*, that is to say, contribution in the ratio of value, wholly irrespective of priority of dates of purchase; second, that the case of the debtor himself and his heir-at-law, in respect of retained lands, was an exception to that principle by reason solely of his personal liability, and that to such exception it mattered not whether the purchasers were such with consideration or without it; third, that when the common incumbrance was *not* a debt of the grantor, but a paramount charge, in respect of which he was under no personal liability, the reason of the exception ceased, the general rule prevailed, and the grantor stood on an equal level with his alienees." The case I have here to deal with is the exception. How can it be said that the assignee under this deed, whether it be voluntary or not, is liable to contribute to the debt of the assignor? The assignor owed a sum of money charged on certain property. What equity would he have had in his lifetime to call upon an assignee from him to pay any part of that debt? I can see none, unless he assigned the property subject to the debt. If, then, the assignor would have had no such equity, I fail to see what greater right his executors can have to call upon the assignee to contribute? Those considerations, coupled with *Ker v. Ker* (3), seem to me to dispose of the case.

It is true that in *In re Jones* (4) North J. came to the conclusion that there ought to be no contribution in that case on the ground that the conveyance contained a covenant by the vendor with the purchaser for further assurance, which was sufficient to dispose of the case. But the point discussed in that case was not the point discussed in *Ker v. Ker* (3), and was not the point discussed before me. The point discussed before me, as to the charge

(1) 3 Rep. 11b.

(2) Ir. R. 4 Eq. 28.

(3) Ir. R. 4 Eq. 15.

(4) [1893] 2 Ch. 461.

being a paramount charge, was not taken before North J. Here I have that one point to proceed upon.

I think the assignee is entitled to succeed, and I answer the question in the summons by declaring that the assignee, in the events which have happened, ought not to bear any proportion of the mortgage debt.

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Solicitors for all parties : *Francis & Calley.*

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[1906 Y. 166.]

Company—Debentures—Registration—Certificate of Registrar—Conclusiveness of Certificate—Companies Act, 1900 (63 & 64 Vict. c. 48), s. 14.

The certificate of the Registrar of Joint Stock Companies under s. 14 of the Companies Act, 1900, is conclusive evidence that all the requirements of the section as to the registration of debentures have been complied with, and where such a certificate has been granted the Court will refuse to go into the question whether such requirements have in fact been complied with, as, for example, whether the debenture-holders of the series registered do in fact rank *pari passu*.

SUMMONS.

Yolland, Husson & Birkett, Limited, was incorporated in August, 1903, under the Companies Acts, 1862 to 1900.

On September 1, 1903, the company resolved upon the issue of a series of 200 first debentures of 100*l.* each, carrying interest at the rate of 4½*l.* per cent. per annum, and of a series of 400 second debentures of 50*l.* each, carrying interest at the rate of 5*l.* per cent. per annum. Both these series of debentures were issued in February, 1904.

The first debentures were guaranteed by the Law Guarantee and Trust Society, Limited, and were secured by a trust deed dated February 1, 1904, and made between the company of the one part and the society of the other, by which the society were

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The second debentures were in the usual form, charging the company's undertaking and all its property whatsoever and wheresoever, both present and future, including its uncalled capital for the time being, subject to the conditions indorsed.

Those conditions were (*inter alia*) as follows:—

“1. This debenture is one of a series of four hundred second debentures each for securing the principal sum of fifty pounds (which series of debentures is hereinafter referred to as the second debentures) issued or about to be issued by the company and which second debentures shall rank next in priority to a series of two hundred debentures of one hundred pounds each (hereinafter referred to as the first debentures) carrying interest at the rate of four pounds ten shillings per centum per annum.

“2. The first eighty-four of the second debentures numbered 1 to 84 both inclusive shall rank *pari passu* with any other of the second debentures which may be issued for the purpose of paying off or redeeming the first debentures or any of them and such first eighty-four of the second debentures and any other of the second debentures which may be issued for the last-mentioned purpose shall rank in priority to the remainder of the second debentures. All moneys to be raised by the issue of second debentures for the purpose of paying off or redeeming the first debentures shall be paid direct either to the trustee or trustees for the time being for the holders of the first debentures or two trustees to be nominated in writing, one by the holder of the second debentures numbered 1 to 60 both inclusive and the other by the holder of the second debentures numbered 61 to 84 both inclusive and the receipt of the trustee or trustees for the time being for the holders of the first debentures or of such two trustees so to be nominated as aforesaid as the case may be shall alone be a sufficient discharge therefor and none of the second debentures shall rank *pari passu* with the said first eighty-four of the second debentures unless such receipt as aforesaid is indorsed thereon or annexed thereto. . . . Save as aforesaid each of the second debentures shall rank *pari passu* as a charge on the property hereby charged without any

preference or priority one over another and such charge is to be a floating security and accordingly the company may in the course of its business and for the purpose of carrying on the same deal with the property hereby charged in such manner as the company may think fit and in particular may mortgage sell lease and exchange the same and may pay and receive money and may declare and pay dividends out of profits provided always that the company is not to be at liberty to create any mortgage or charge ranking in priority to the said first eighty-four of the second debentures (save and except the first debentures and save and except as provided by condition number 4 hereof) or *pari passu* therewith and is not to be at liberty to create any mortgage or charge ranking in priority to the remainder of the second debentures (save and except the first debentures and the said first eighty-four of the second debentures and save and except as provided by condition number 4 hereof) or *pari passu* therewith."

On application for the registration of these second debentures the registrar of joint stock companies was asked, in the first instance, to register the debentures in two series, namely, first, Nos. 1 to 84, both inclusive; and so many others as might be issued to rank *pari passu* with them; and, secondly, the remainder of the issue. Eventually the registrar registered the whole of the issue as one series, merely directing that the usual particulars should be entered on the register, viz., the total amount secured by the whole series (20,000*l.*), and a short description of the property charged, and thereupon issued his certificate. The certificate was as follows:—

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*"Certificate of the Registration of a Series of Debentures
where there is no Trust Deed.*

"Pursuant to s. 14 (6.) of the Companies Act, 1900 (63 & 64 Vict. c. 48).

"Application having this day been made for the entry on the register of the particulars required by sub-s. 4 of s. 14 of the Companies Act, 1900, in relation to a series of second debentures containing a charge (to the benefit of which the debenture-holders of the said series are entitled *pari passu*), created by

WARRING- Yolland, Husson & Birkett, Limited, by resolution passed on the
TON J. 1st day of September, 1903 (and one of such debentures dated
1907 within twenty-one days of this date having been produced) I
hereby certify that the total amount secured or intended to be
YOLLAND, secured by the said series is 20,000*l.*, and that all the particulars
HUSSON & required by sub-s. 4 of s. 14 of the said Act in relation to the
BIRKETT, said series have been this day entered on the register.
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" Given under my hand at London this 11th day of February,
one thousand nine hundred and four.

" H. F. Bartlett,

" Registrar of Joint Stock Companies."

The plaintiff was the holder of fifty-two second debentures, namely, Nos. 61 to 84, both inclusive, 170 to 179, both inclusive, and 195 to 212, both inclusive. On March 7, 1906, he commenced the present action on behalf of himself and all other the holders of second mortgage debentures of both classes issued by the company to enforce his security. By his statement of claim he alleged that certain of the first debentures had been paid off by the company and had been wrongfully reissued by it.

By an order dated April 5, 1906, the Law Guarantee and Trust Society, Limited, was added as a defendant to the action.

On November 6, 1906, an order was made for the winding up of the company.

The first debentures having become payable, the Law Guarantee and Trust Society realized the assets comprised in the trust deed and paid off the debenture-holders, and, by an order dated April 22, 1907, the society obtained liberty to transfer and pay into Court to the credit of the action the surplus proceeds of realization subject and without prejudice to its claims for costs, charges and expenses, or otherwise.

On April 30, 1907, an order was made directing preliminary inquiries with a view of ascertaining the persons entitled to the second debentures, what (if any), was the priority among them, and what was due to them in respect of such rights.

On the taking of those accounts and inquiries an objection was raised to the validity of the registration of the second debentures.

On July 16, 1907, the registrar made his certificate, leaving the question as to the validity of the registration to be decided by the Court.

There were in Court certain funds which had been paid in by the Law Guarantee and Trust Society representing the balance of the assets realized by it after payment off of the first debentures.

The present summons was taken out by the plaintiff, asking that the funds in Court might be dealt with as directed in the schedule thereto, the payments thereby directed being in satisfaction of what was due for principal and interest to the holders of, or the persons entitled to, the second mortgage debentures, Nos. 1 to 84, which had priority over the other second mortgage debentures.

F. Whinney, for the plaintiff. The question in this case turns on the construction of s. 14 of the Companies Act, 1900, which provides for the registration of mortgages and charges. Sub-s. 6, which is the material sub-section, provides that the certificate given by the registrar "shall be conclusive evidence that the requirements of this section as to registration have been complied with." The objection taken to the registration of these second debentures is that they were registered as one series. Debentures Nos. 1 to 84 all clearly rank *pari passu*, and the registration of them is effective. In addition the registrar has registered debentures up to the amount of 20,000*l.* If he was wrong in so doing, his certificate is nevertheless conclusive evidence that the requirements of s. 14 as to registration have been complied with. It is for the registrar to determine whether those requirements have been complied with, and if he so determines his certificate is conclusive on the point. The certificate in the present case states on the face of it that it was given pursuant to s. 14, sub-s. 6. Under sub-s. 7 the duty is cast upon the company of seeing to the registration of debentures. In *In re Harrogate Estates, Ltd.* (1) Buckley J. held that the words "debentures containing any charge" in sub-s. 4 of s. 14 were equivalent to debentures which have the benefit of a

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(1) [1903] 1 Ch. 498.

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charge, and in reliance on that decision the office has registered debenture stock which did not contain a charge, but it is not now the practice of the office to register debenture stock under that section. Unless, therefore, the certificate is held to be conclusive, the registration of very large amounts of debenture stock will be invalid.

[He was stopped.]

P. F. Wheeler, for the liquidator representing the unsecured creditors. Sub-s. 4 of s. 14 has not been complied with, and the second debentures are not, therefore, protected.

[WARRINGTON J. The question is, Is not the registrar's certificate conclusive evidence on the point?]

It is submitted that it is not. The words "certificate shall be conclusive evidence that all the requirements of this section as to registration have been complied with" in sub-s. 6 are taken from s. 18 of the Companies Act, 1862. And on the construction of those words it was held in *In re National Debenture and Assets Corporation* (1) that a certificate of incorporation of a company could not be treated as conclusive evidence of the fact that seven persons had signed the memorandum of association, and that if a less number had signed it the Court had no jurisdiction to make a winding-up order. The matter does not rest there. In *Salomon v. Salomon & Co.* (2) Lord Davey said: "It was not argued in this case that there was no association of seven persons to be registered, and the registration therefore operated nothing, or that the so-called company was a sham and might be disregarded. . . . I do not say that such an argument ought to or would prevail; I only observe that, having regard to the decisions, it is not certain that s. 18, making the certificate of the registrar conclusive evidence that all the requisitions of the Act in respect of registration had been complied with, would be an answer to it." Applying those observations to the present case, it is submitted that the certificate here is not conclusive. It goes further than is required by sub-s. 6. That sub-section only requires that the registrar shall state the amount secured. There is here no series of second debentures to the amount of 20,000*l.* ranking *pari passu*, as

(1) [1891] 2 Ch. 505.

(2) [1897] A. C. 22, 55.

stated in the certificate. In drafting sub-s. 6 of s. 14 of the Act of 1900, the Legislature considered it sufficient to copy the insufficient provisions of s. 18 of the Act of 1862. If it had intended that the certificate of registration was to be as conclusive as the certificate of incorporation of the company now is (s. 1 of the Act of 1900, which extends and supersedes s. 18 of the Act of 1862), it would have used different language.

E. Beaumont, for the Law Guarantee and Trust Society, supported the same contention.

L. F. Potts, for another defendant.

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WARRINGTON J. This is an application for payment out of certain funds in Court of a sum of money due to certain holders of a series of second debentures, who say that they are entitled to be paid in priority to other debenture-holders of the same series. The objection taken to that security is that it is not sufficiently registered, and that is the question I have to determine.

[His Lordship stated the facts, and said, with reference to condition 2 of the indorsed conditions, that its effect was that the whole of the holders of the issue might in certain events rank *pari passu*, that is, that the condition as to priority might have applied to the whole of the issue, in the event of the remaining second debentures being used to pay off the first debentures. He continued:—] It is suggested that the requirements of s. 14 of the Act of 1900 as to registration have not been complied with. Sub-s. 6 of that section provides that “The registrar shall give a certificate under his hand of the registration of any mortgage or charge registered in pursuance of this section, stating the amount thereby secured (which certificate shall be conclusive evidence that the requirements of this section as to registration have been complied with).” It seems to me that I have here a certificate of the registration of a charge created by this series of debentures. It states the amount secured, and purports to be a certificate given pursuant to s. 14, sub-s. 6. I cannot go behind that certificate. The Act makes it conclusive evidence.

Perhaps it is desirable that I should state what another point raised is, but I do not propose to express a decided opinion on it. Sub-s. 3 of s. 14 provides for the keeping of a register, and for the

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 entry in that register with respect to every mortgage or charge, the date of creation, the amount secured by it, short particulars of the property mortgaged or charged, and the names of the mortgagees or persons entitled to the charge. Those are the requirements of registration. Then there is a proviso in sub-s. 4 relaxing those requirements in the case of a series of debentures containing any charge to the benefit of which the debenture-holders of that series are entitled *pari passu*. It is said that these debentures do not rank *pari passu*, and therefore that they do not come within that sub-section. Whether or not that objection is sound I do not say, but I do say that the certificate states that the particulars of registration have been complied with, and on that the certificate is conclusive.

Solicitors: *Sole, Turner & Knight, for H. March, Worcester; Ward, Bowie & Co., for W. & E. H. Foster, Leeds; Gribble, Oddie, Sinclair & Johnson; Warlow & Patey.*

W. I. C.

NEVILLE J. *In re* REGISTERED TRADE MARK No. 37,760 OF
 DAVID GESTETNER.

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July 10, 11. *Trade Mark—Patented Article—Invented Word descriptive of patented Article—Fancy Word—Registration—Removal from Register after Twenty Years—Patents, Designs and Trade Mark Act, 1883 (46 & 47 Vict. c. 57), s. 64—Trade Marks Act, 1905 (5 Edw. 7, c. 15), ss. 3, 9, 35, 36.*

In construing s. 36 of the Trade Marks Act, 1905, on an application to expunge from the register a trade mark registered under a previous Trade Marks Act, the question is, not whether the mark would at the date of its registration have been registrable under the Act of 1905 had that Act then been in force, but whether the mark is at the date of the application to expunge, i.e., the decision, a mark registrable under the Act of 1905.

An invented word descriptive of and created and used to denote a patented article is not registrable as a trade mark under the Act of 1905.

In 1881 G. obtained letters patent for a new kind of pen which he called the "Cyclostyle," and assigned his patent to F., who from 1882 onwards manufactured and sold the pen and its accessories, ink, roller and paper, under the name of "Cyclostyle," and in 1884 he registered

that word under the Trade Marks Act, 1883, in respect of a certain class of goods that he sold, i.e., stationery, including the pen and its accessories, and that word became well known to and was used by the trade and the public to denote the patented article and its accessories.

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On an application under s. 35 of the Trade Marks Act, 1905, by a party aggrieved to expunge the word from the Register of Trade Marks on the ground that it was descriptive of a patented article and never had been, and was not, registrable under any of the Trade Marks Acts :—

Held, that the word was not registrable under the Act of 1883, because, at the date of its registration, it was not a fancy word not in common use, but was a word descriptive of a patented article :—

Held, also, that the word was not registrable under the Act of 1905, because it was not “an invented word” within the meaning of ss. 3 and 9 of that Act, but the name of a patented article which could not be said to be distinctive of the goods of a particular trader.

The word was therefore ordered to be removed from the register.

MOTION.

This was an application to rectify the Register of Trade Marks by expunging therefrom the word “Cyclostyle” under these circumstances.

In June, 1881, one David Gestetner obtained letters patent for a circular pen which he called the “Cyclostyle.” By an agreement dated September 26, 1881, and made between David Gestetner of the one part and one Massey Mainwaring, trading as Fairholme & Co., of the other part, David Gestetner agreed, in consideration of certain payments and royalties, to assign to Fairholme & Co. his letters patent for his said invention called the “Cyclostyle,” and this agreement was subsequently carried into effect by a deed of assignment.

At first Gestetner manufactured the pen for Fairholme & Co., but afterwards they manufactured for themselves, and from 1881 they sold the pen and its accessories, paper, ink, and roller, under the name of “Cyclostyle,” and that word became well known to the trade and the public as descriptive of the patented article and its accessories.

On April 5, 1882, Fairholme & Co. registered under the Trade Marks Act, 1875, a trade mark consisting of the device of a wheel with the word “Cyclostyle” underneath, and this trade mark was not attacked. They also on May 27, 1884, registered the word “Cyclostyle” alone under the Trade Marks Act, 1883, in respect of certain goods in class 39, namely, stationery

NEVILLE J. and apparatus for producing facsimile copies of writings and designs.

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By deed dated July 25, 1904, David Gestetner acquired from Fairholme & Co., who also traded as "The Cyclostyle Company," their business and the goodwill thereof and the exclusive right to use the name "The Cyclostyle Company," and all trade marks used in connection with their said business, and particularly the word "Cyclostyle" and the registered trade marks of April 5, 1882, and May 27, 1884. The patent expired in 1895.

About 1899 the Neostyle Manufacturing Company, Limited, was incorporated for the purpose of manufacturing and selling stationery and apparatus for producing facsimile copies of writings and designs and other goods of a similar character, and were carrying on business in such goods; and this company now applied under s. 35 of the Trade Marks Act, 1905, to rectify the Register of Trade Marks by removing therefrom the word "Cyclostyle," on the ground that the word was descriptive of a patented apparatus and never had been, and was not now, registrable under any of the Trade Marks Acts.

Jenkins, K.C., and *Sebastian*, for the applicants. The trade mark "Cyclostyle" ought to be removed from the register, because it is simply the name of an article which was invented and patented in 1881, and it has become part of the English language as the name of that particular article. It is defined in the *Encyclopædia Britannica*, 9th ed., vol. XXIV. p. 697, and in the *Century Dictionary* (1889 ed.), vol. II. p. 1425. A patentee cannot extend his monopoly by registering the name of the patented article as a trade mark: *Linoleum Manufacturing Co. v. Nairn* (1); *In re Magnolia Metal Co.'s Trade Marks*. (2)

[NEVILLE J. referred to *Braham v. Bustard*. (3)]

There the name was found to denote the thing that was manufactured by the plaintiff, and not to be the mere name of the thing itself. The mark can be removed from the register under s. 35 of the Trade Marks Act, 1905, as an entry made without

(1) (1878) 7 Ch. D. 834.

(2) [1897] 2 Ch. 371.

(3) (1863) 1 H. & M. 447.

sufficient cause: *In re Batt & Co.'s Trade Marks* (1); or on the ground that it was not registrable under the Act of 1883, under which it was registered, because it was not a fancy word not in common use. It is true that s. 36 provides that a mark which is registrable under the Act of 1905 is not to be struck out because it was not registrable under the Act in force when it was registered. But that only means that a mark is not to be struck off if the owner could immediately apply to have it put on again and is intended to meet that point decided in *In re Apollinaris Co.'s Trade Marks*. (2) It cannot mean that you are to refer the section back and inquire whether the mark would have been registrable if the Act of 1905 had been in force when it was registered. But, even if that construction is to be put on the section, this mark could not have been registered in 1884, because it was not an invented word distinctive of the goods of a particular trader at the date when it was taken as a trade mark, but already had a meaning descriptive of a patented article.

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[NEVILLE J. referred to *Kodak, Ltd. v. London Stereoscopic and Photographic Co.* (3)]

There it was proved that the word "Kodak" meant "manufactured by the plaintiff company," and did not describe any particular article; and in *In re Linotype Co.'s Trade Mark* (4) the word in question, though not invented by the applicants, had never been used in England.

Thomas Terrell, K.C., and Walter, K.C., for the respondent. In this case the trade mark was used before it was registered. We admit a man cannot patent an article, give it a name, and then use the name as a trade mark after the patent has expired, but if he has used the name as a trade mark, and afterwards registers it, he can continue to use the trade mark. In this case "Cyclostyle" is not the name of the pen only, but is the trade mark for all apparatus for making stencils and stationery to be used therewith manufactured by the respondent. The

(1) [1898] 2 Ch. 432; affirmed,
[1899] A. C. 428, sub nom. *John*
Batt & Co. v. Dunnett,

(2) [1891] 2 Ch. 186.

(3) (1903) 20 Rep. Pat. Cas. 337,
350.

(4) [1900] 2 Ch. 238.

NEVILLE J. term "invented word" must mean invented at the time of its dedication to trade, not of its registration. The Apollinaris marks were struck off because there was no intention to sell the articles, not because they were invented before registration. "Cyclostyle" was an invented fancy word within the Act of 1883, like the word "Solio" in the case of *Eastman's Photographic Materials Co. v. Comptroller-General*. (1) It was registered, not by the patentee, but by a trader, who at once applied and used it as his trade mark, not only for the pen, but for its accessories, ink, paper, and roller. These facts distinguish the case from the *Linoleum Case* (2) and the *Magnolia Case* (3), where the word defined a particular substance only. Here the word is a distinctive fancy word applicable to a class of goods, and was therefore entitled to registration under the Act of 1883: *Kodak, Ltd. v. London Stereoscopic and Photographic Co.* (4); *In re Trade Mark No. 58,405 "Bovril"* (5); *In re Linotype Co.'s Trade Mark* (6); *In re Burgoyne's Trade Mark*. (7) The word has been on the register for over twenty years, and the onus is on the applicants to shew that it ought to be removed: *In re Leonard and Ellis's Trade Mark*. (8) Then, as to s. 36 of the Trade Marks Act, 1905—

[NEVILLE J. Do you agree that, both under the Act of 1883 and the Act of 1905, when you consider whether an invented word is registrable, you must consider whether it came into existence exclusively as a trade mark for goods?]

No. We submit the intention of an invented word is nihil ad rem. The point is registration. The Act of 1905 is intended to protect and facilitate registration, and s. 36 is to be read into the Act of 1883 nunc pro tunc, and if a trade mark at the date of its registration was registrable under the Act of 1905, it is not to be removed although at the date of its registration under the Act of 1883 it was not registrable. "Cyclostyle" was such a word, for it was at the date of its registration an invented fancy word distinctive of the goods of Fairholme & Co.

(1) [1898] A. C. 571.

(2) 7 Ch. D. 834.

(3) [1897] 2 Ch. 371.

(4) 20 Rep. Pat. Cas. 337, 350.

(5) [1896] 2 Ch. 600.

(6) [1900] 2 Ch. 238.

(7) (1889) 6 Rep. Pat. Cas. 227.

(8) (1884) 26 Ch. D. 288.

Jenkins, K.C., in reply. Sect. 36 of the Act of 1905 is not retrospective, but, if it is, ss. 3 and 9 of the Act shew that the trade mark must be a fancy word not in common use and distinctive of the goods of a trader at the date of its registration: *Bourne v. Swan & Edgar, Ltd.* (1); *Meaby & Co., Ltd. v. Triticine, Ltd.* (2) Here the word was invented and used to describe a patented article.

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NEVILLE J. In this case the question is whether the trade mark "Cyclostyle," registered on May 27, 1884, ought to remain upon the register, and I think I must, in the first instance, consider whether it was properly registered at the date of registration. Now what were the facts connected with the word "Cyclostyle" at the time of registration? I think it is quite clear that at that date, and for several years before, "Cyclostyle" was the name of an invention patented in 1881 by Mr. Gestetner, the present respondent. On the evidence I feel compelled to come to that conclusion, although, as this is a case in which the mark has remained on the register from 1884 until the present time, I think that where any matter is left for the inference of the Court, that inference ought to be drawn in favour of the owner of the mark. I think it is not going too far to say that the Courts have laid down that a mark which has been used for twenty years and upwards should, at all events, be benevolently treated in considering whether it is a good mark or a bad one. But on the evidence, as I have said, I am compelled to come to the conclusion that "Cyclostyle" was the name of a patented invention. All doubt upon the point is removed by Mr. Gestetner himself. In his own affidavit he says, after referring to the grant to himself of the letters patent for his invention: "The pen, the subject-matter of such last-named invention, I determined to call the 'Cyclostyle.'" Then on September 26, 1881, he entered into an agreement with Messrs. Fairholme & Co., under which he agreed to make over to them his invention for a cog-wheel pen called the "Cyclostyle," and under the terms of that agreement he had, in certain circumstances, the right to have the letters patent restored to him; so that he did not entirely divest himself of all interest in his

(1) [1903] 1 Ch. 211, 217.

(2) (1897) 15 Rep. Pat. Cas. 1, 15.

NEVILLE J. invention by that agreement. There is no doubt that from 1884, and possibly from 1882, onwards Messrs. Fairholme & Co. used the word "Cyclostyle," not only in connection with the pen itself, but in connection with everything they sold which related to it—the ink, the paper, the roller, the box in which it was sold, and so forth.

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The first question, therefore, inasmuch as the mark was registered in 1884 under the Act of 1883, is whether under s. 64 of that Act it was a good registration. I need not refer to the section beyond saying that the point is whether the word was "a fancy word not in common use." In my opinion a word, although invented, which has already been applied as a name to a patented invention, cannot be a fancy word within the meaning of that Act. In order to satisfy the words of that Act it has long been held that a fancy word must be non-descriptive. Now here, I think, the word was descriptive, and for two reasons. It was descriptive inasmuch as it was the name of a particular article, and it was descriptive inasmuch as it did give, although in languages other than English, a combined word which does describe the article in question. From the name you would expect the article in question to exhibit the attributes of a circle and of a pen, and the article does so. I hold, therefore, that in 1884, at the date of registration, the word was not a fancy word. I think that what I have said with regard to the registration in 1884 applies with equal force to 1882, when Messrs. Fairholme & Co. registered the word "Cyclostyle" as part of a device. I may also say that I do not think that the use of that word as an added word to the trade mark in 1882 in any way made the word distinctive of Messrs. Fairholme & Co.'s trade so as to put them in a better position in 1884 than if that registration had not been effected.

The next question I have to consider is whether under the Act of 1905 the word was an invented word, because, if it was an invented word, then I have to apply s. 36 of that Act, which provides that: "No trade mark which is upon the register at the commencement of this Act and which under this Act is a registrable trade mark, shall be removed from the register on the ground that it was not registrable under the Acts in force at the

date of its registration. . . .” Before I can properly consider that question, I have to arrive at a conclusion as to the meaning of the section, that is, whether it means a mark which at the date of its registration would have been properly registered had the Act of 1905 applied, or whether it means a mark which would be at the time of the decision registrable under the Act of 1905, is to be left upon the register, and not, as was decided in the *Apol-linaris Case* (1), removed, although the result might be that upon taking the necessary steps the mark could at once be restored to the register. I do not think that so wide a construction as was contended for by Mr. Terrell and Mr. Walter can be put upon the section. I think that the Legislature would have used words of another character had it intended to validate the registration under former Acts of all marks which fulfilled the conditions provided by the Act of 1905. I think that the strictly grammatical construction of the section is the true one, and that the present tense, “which under this Act is a registrable trade mark,” was advisedly used, the question to be solved being, not whether the mark would have been registrable under the Act of 1905 had it been in operation at the date of registration, but whether, supposing the mark were removed from the register, it would be such a mark as could be registered again under the Act of 1905. If that is so, the question is whether the word “Cyclostyle” is at the present time an “invented word” capable of registration under the Act of 1905. It seems to me that under that Act a word which has been created and applied as the name of a patented article is not within the purview of the Act. I think that that is so upon one or both of two grounds. First of all, that in such a case it is not “invented” within the meaning of s. 9 of the Act; and, secondly, that it does not come within the definition of “trade mark” in s. 3 of the Act, inasmuch as I think it is impossible that the name of a patented article can be distinctive of the trade of a particular individual. I think it could not be used or be proposed to be used in connection with goods for the purpose of indicating that they are the goods of the proprietor of such trade mark, for I think it would be impossible that such a word could fulfil any such purpose.

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(1) [1891] 2 Ch. 186, 234.

NEVILLE J. I hold, therefore, that the mark must be removed from the
 1907 register, and that the applicants must have the costs.

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Solicitors: *C. Urquhart Fisher; Pritchard, Englefield & Co.*

H. L. F.

NEVILLE J. *In re* SOCIETY FOR TRAINING TEACHERS OF THE
 1907 DEAF AND WHITTLE'S CONTRACT.

July 12, 13.

(LIVERPOOL DISTRICT REGISTRY.)

[1907 S. 854.]

Charity—Incorporated Educational Society—"Endowment"—Voluntary Contributions—Scholars' Fees—Sale of Charity Land—Consent of Board of Education—Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), ss. 62, 66—Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), ss. 29, 48—Board of Education Act, 1899 (62 & 63 Vict. c. 33), s. 2.

In 1886 a society incorporated under s. 23 of the Companies Act, 1867, with the object (inter alia) of teaching and training teachers for deaf mutes; and of providing schools and colleges for that purpose, acquired freehold property which it used as a training college for its purposes. The purchase-money for the property was paid partly by voluntary contributions and partly by the proceeds of a bazaar organized for the purpose. The society being an educational charity, the jurisdiction of the Charity Commissioners (if any) with respect to it became, under certain statutory provisions, vested in the Board of Education. The society, apart from the property so acquired, had no endowment, and was entirely supported by—(1.) voluntary contributions; (2.) payments by or on behalf of scholars; (3.) grants from the Board of Education; and (4.) grants from school boards out of local rates. In 1907 the society contracted to sell the property:—

Held, that the property, having been purchased with moneys applicable to the general purposes of the society, was not an endowment, and that the society could sell it without the consent of the Board of Education.

In re Clergy Orphan Corporation, [1894] 3 Ch. 145, followed.

Held, also, that the society was "wholly maintained by voluntary contributions" within the meaning of s. 62 of the Charitable Trusts Act, 1853, notwithstanding that its sources of income included the items (2.), (3.), and (4.) above mentioned.

The difficulty suggested by Lindley M.R. in *In re Stockport Ragged Industrial and Reformatory Schools*, [1898] 2 Ch. 687, 697, discussed.

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In the year 1878 the above-named society was inaugurated, with a committee of management, for the purpose of training

teachers of the deaf upon the German or Pure Oral system. The committee received and disposed of all the funds of the society and managed the affairs of the society. On August 10, 1881, the committee entered into a contract to purchase a freehold house and lands at Ealing to be used as a training college for their system. The purchase price was 5200*l.*, but by a term of the contract completion was deferred for five years.

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On November 5, 1886, the society was incorporated under the Companies Acts, 1862 to 1880, as an association falling within s. 23 of the Companies Act, 1867, with a memorandum and articles of association. The memorandum (s. 3) defined the objects of the society to be (inter alia)—(a) to carry into effect an agreement dated October 11, 1886, and made between the committee of the one part and one Champernowne on behalf of the intended incorporated society of the other part; (b) to train teachers of deaf mutes, deaf children, and other deaf persons upon the German or Pure Oral system; (c) to institute, provide, and maintain schools for teaching upon the German system deaf mutes, deaf children, and other deaf persons, upon such terms and conditions and upon payment of such fees, as the society might from time to time determine, provided always the surplus (if any) of such payments, after deducting the expenditure necessary for the maintenance of such schools, was devoted to such of the objects of the society therein set forth as might be deemed expedient; (d) to institute, provide, and maintain a training college for the purpose of educating, training, and making proficient instructors of the German system any persons desirous of becoming teachers of deaf mutes, &c.; (e) to purchase, take on lease, or otherwise acquire, and also to dispose of, any houses or lands of any tenure or any real and personal property; (f) to borrow and raise money for the purposes of the society's business, and to secure the repayment thereof by bonds, debentures, mortgages, or other securities, or in such other manner as might be determined, and for this purpose to mortgage or charge all or any of the property of the society; and s. 4 provided that the income and property of the society, whencesoever derived, should be applied solely towards the promotion of the objects of the society as set forth in the

NEVILLE J. memorandum, and no portion thereof should be paid or transferred
 1907 directly or indirectly by way of dividend, bonus or otherwise
 SOCIETY FOR howsoever by way of profit to the members of the society. The
 TRAINING articles of the society provided for the constitution of a committee
 TEACHERS OF of management, with power, amongst other things—(a) to adopt
 THE DEAF the agreement of October 11, 1886; (d) to sell, let, or dispose of
 AND the agreement of October 11, 1886; (d) to sell, let, or dispose of
 WHITTLE'S any lands, buildings, or other property of the society not
 CONTRACT, required for the purposes thereof; (m) to borrow and raise money
In re. for the purpose of the society's business, and to secure the
 — repayment thereof by bonds, debentures, mortgages or other
 securities, or in such other manner as might be determined, and
 for this purpose to mortgage or charge all or any of the property
 of the society, whether real or personal; and (p) to enter into
 such contracts, and do all such acts and things as they might
 think expedient for the purposes of the society.

By the agreement of October 11, 1886, after reciting the formation of the society in 1878 (thereinafter called the original society), and that its committee of management had carried on the work and managed the business of the original society and had entered into the contract of August 10, 1881, for the purchase of the house and lands at Ealing on behalf of the original society; and that certain persons as trustees held all the funds of the original society upon such trusts and purposes for the benefit of the society as the committee might from time to time direct; and that it was intended that the original society should be registered and incorporated under the Companies Acts as an association falling within s. 23 of the Companies Act, 1867; and that all the property, rights, assets and liabilities of the original society or of the committee or of the trustees should be transferred to and vested in the new incorporated society upon the terms thereafter contained; and that the intended new incorporated society was thereafter referred to as the society, it was witnessed (*inter alia*):—

1. That upon the registration of the society the committee would at the expense of the society transfer and assign to the society all the assets, property and rights of the original society or of the committee on their behalf, and also all rights and liabilities of the original society and of the committee under or

by virtue of the agreement for the purchase of house and lands of August 10, 1881; and that the committee would cause the said trustees to transfer the funds held by them on behalf of the original society to the society.

2. That in consideration of the premises the society should undertake to pay all sums of money for which the original society or the committee might be liable at the date of the registration aforesaid under the provisions of the agreement of August 10, 1881, and all other the sums of money for the payment of which the original society or the committee might be liable at the same date in respect of the carrying on to such date of the original society's undertaking.

After its incorporation the society by its committee adopted and carried into effect the agreement of October 11, 1886, and also completed the purchase of the house and lands at Ealing. The purchase price of 5200*l.* was paid as to 2000*l.* by the proceeds of a bazaar organized shortly before the incorporation of the society, as to 1000*l.* by voluntary subscriptions, and the balance of 2200*l.* was left on mortgage of the property at interest, but was subsequently paid off out of voluntary subscriptions.

Apart from the house and lands at Ealing, which were called "Elmhurst," the society had no endowment, and its income was entirely derived from—(1.) voluntary subscriptions; (2.) payments by or for scholars; (3.) grants from the Board of Education; (4.) grants from school boards out of local rates.

From 1886 to 1907 the society used Elmhurst as a college for training teachers of the deaf. In January, 1907, the society, no longer requiring the college for its purposes, contracted to sell it to one Whittle at the price of 3850*l.* On investigating the title the purchaser made a requisition to the effect that the society was a charity to which s. 29 of the Charitable Trusts Amendment Act, 1855, applied, and that the sanction of the Charity Commissioners to the sale must be obtained. The society contended that it was not an endowed charity, and therefore that s. 29 did not apply and the sanction of the Commissioners was unnecessary. It then appeared that, the society being an educational charity, the powers of the Commissioners (if any)

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NEVILLE J. had been transferred by s. 2 of the Board of Education Act, 1899, and certain Orders in Council to the Board of Education. The
 1907 and certain Orders in Council to the Board of Education. The
 SOCIETY FOR society, at the suggestion of the purchaser, approached the Board
 TRAINING of Education, who stated that their consent to the sale was not
 TEACHERS OF necessary, the charity, in their opinion, being exempt from their
 THE DEAF jurisdiction. The purchaser, however, insisted that the formal
 AND consent of the Board should be obtained, and took out a summons
 WHITTLE'S under the Vendor and Purchaser Act, 1874, for a declaration that
 CONTRACT, the society was a charity to which s. 29 of the Charitable Trusts
In re. Amendment Act, 1855, applied, and that the approval of the
 Board of Education must be obtained by the society to the sale.

H. Mather, for the summons. The opinion of the Board of Education is not conclusive, and the purchaser seeks a declaration from the Court. The society is within the definition of a charity in s. 66 of the Charitable Trusts Act, 1853, and has an endowment, for by the same section the expression "endowment" includes any real estate "which shall for the time being belong to or be held in trust for any charity," and the question is, assuming that the incorporation of the society does not exempt it, whether it comes within the exemptions in s. 62 of that Act. It is submitted that it does not. The onus is on the society to shew that it is exempt: *In re Clergy Orphan Corporation*. (1) In that case s. 62 was very fully considered, and it was held that land purchased with moneys applicable to the general purposes of the society was exempt. Here it is not proved that the land was purchased entirely with voluntary contributions, for the evidence does not shew the purpose for which the bazaar was held. The donors to the society were not the original contributors at the bazaar, but the original society who transferred the proceeds of the bazaar and all their other assets to the incorporated society. The memorandum of association is the deed of trust of the incorporated society, and the recitals in the agreement of October, 1886, shew the intention of the parties, and if the object of the bazaar was to raise the money to complete the purchase of Elmhurst and the money was transferred to the incorporated society for that

(1) [1894] 3 Ch. 145.

purpose, it would be a trust for the charity, and this property would be an endowment: *In re Gilchrist Educational Trust*. (1) 1907
 The society may rely on *In re Church Army* (2), but the facts of that case were very special, and not at all like the present. If the property is an endowment, then the jurisdiction of the Board of Education extends to it. But even if it is not an endowment, the society is not within the exemptions in s. 62. That section exempts charities (a) wholly maintained by voluntary contributions, or (b) partly maintained by voluntary contributions and partly by income from any endowment; and a charity, in order to be exempt, must come precisely within the limits of the exemptions: *In re Gilchrist Educational Trust*. (3) This society is not within those limits, because it is maintained partly by voluntary contributions and partly from other sources, not being income of any endowment, i.e., scholars' fees and grants from the Board of Education and from school boards. Therefore the jurisdiction of the Board of Education extends to this charity. The case raises, in fact, the difficulty referred to by Lindley M.R. in *In re Stockport Ragged, Industrial and Reformatory Schools* (4), but which he did not decide.

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[NEVILLE J. Why are these grants not voluntary contributions?]

Lindley M.R. seems to be of opinion that they are not, although I must admit that in Tudor on Charities, 4th ed. p. 562, that view is doubted. But here we also have payments by and for scholars which cannot be called a voluntary contribution within s. 62. It is something which the society is earning to provide for its maintenance.

[NEVILLE J. It seems to me that a contribution may be voluntary although some consideration may be given for it in the way of teaching.]

It is submitted that if a society, which is incorporated, trades and earns money, that that is not a voluntary contribution within the section.

[NEVILLE J. I do not see why not, or why the earning of money should bring the society within the jurisdiction of the

(1) [1895] 1 Ch. 367.

(2) (1905) 74 L. J. (Ch.) 624.

(3) [1895] 1 Ch. 371.

(4) [1898] 2 Ch. 687, 697-8.

NEVILLE J. Charity Commissioners, because that would be absolutely contrary to the meaning of the Act as a whole. The Act only seeks to provide for the due administration of the endowed funds of charities under the suspicion that in certain cases they might be misapplied. Therefore, as the Courts have interpreted it, where a charity has complete control over its funds so that it can apply capital or income as it pleases for its maintenance, the Act does not apply and the Commissioners do not interfere. But where its maintenance depends on endowment the income of which forms the whole or part of its maintenance, then with regard to that it is subject to the jurisdiction of the Commissioners. That is intelligible. But it would not be reasonable to say that, in addition to that, the charity must be subject to the control of the Commissioners if it earns any money. The real question is whether the funds are under the complete control of the society or whether they are not. Where the funds are under its complete control, capital, income, and everything else, then the Act does not apply. Where they are not, it does apply. Of course, money that the society earns is just as much under its complete control as money given to it without consideration. The Act divides the sources of income of a charity into two categories, endowed and non-endowed. It calls non-endowed income voluntary contributions.]

If the Court is prepared to hold that voluntary contributions mean everything that is not endowment, I cannot carry the argument any further. But on the facts I do submit that this particular property is an endowment.

Jenkins, K.C., and *Adams*, for the society, were not called upon.

NEVILLE J. Mr. Mather has argued this case very ably. What I have to consider is whether or no the property which the society has contracted to sell can be sold without the consent of the Board of Education. Now I think that depends upon whether the property was an endowment, or whether it was property which the society was entitled to deal with as it pleased for its general purposes. The society is now incorporated; and I assume for the purpose of my present judgment, first, that the

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society is a charity within the Charitable Trusts Acts; and, secondly, that it is so none the less because it is an incorporated company. Neither of those points are necessary for the purpose of my decision to-day. The question therefore is, Does it come within the exemptions contained in s. 62 of the Charitable Trusts Act, 1853? In construing that section I have the advantage of the decision of the Court of Appeal in the case of *In re Clergy Orphan Corporation* (1), in which the construction of the Act was very elaborately considered. The first question is a question of fact. Is this society endowed at all, and, if it is endowed, does the particular property agreed to be sold form part of that endowment? If it is endowed at all, I think this property would probably constitute the endowment, because I do not see any evidence to shew that, apart from this property, the society is possessed of any endowment. Now originally the society was unincorporated and its funds were dealt with at the discretion of the committee, who undoubtedly could apply capital or income of the funds that they received for the general purposes of the society. It was then determined to incorporate the society, and it was incorporated under the Companies Acts, and there was a transfer of all the property of the society to the company. Along with that transfer were transferred the powers of the committee, including the power of dealing with the funds of the society in any way they thought fit. I think, therefore, that after the transfer the company was in a position to deal with its assets for general purposes in any way it pleased. Then this particular property was acquired for the purposes of the society, and the purchase-money was obtained partly by voluntary contributions, partly by a mortgage, and part of it was the result of a successful bazaar held for the benefit of the society. It is said that the burden of shewing that the proceeds of the bazaar were not an endowment is upon the society. I am not at all clear that that is so. I think that in order to shew an endowment, in the case of a society which otherwise is maintained by voluntary contributions, you must shew that the money was given under conditions which involved the inability of the society to apply the capital of the fund towards its general purposes.

(1) [1894] 3 Ch. 145.

NEVILLE J. But, whether that is so or not, I take the affidavit of the purchaser's solicitor upon the question. He says: "It appears from the letter dated the 28th day of January, 1907, from the vendor society's solicitors to my said firm that the balance of the said purchase-money to the amount of 3000*l.* was raised as to 2000*l.* approximately by a bazaar organized in support of the vendor society, and that the balance was made up by voluntary contributions." On that statement I think it is quite clear that the 2000*l.* resulting from the bazaar organized in support of the vendor society was a fund which it could apply to general purposes or in any way it pleased, notwithstanding that the bazaar was held for the purpose of putting it in funds with which to discharge the debt it owed for this property which it had contracted to purchase.

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So far, therefore, we have the case of a society supported entirely by voluntary contributions. But then it is said that the society has received Government grants, and grants from educational authorities, and fees or payments, for or on behalf of scholars who have been educated at the society's schools, and the point is raised, founded upon a difficulty suggested by Lindley M.R. in the case of *In re Stockport Ragged, Industrial and Reformatory Schools* (1), that it has sources of income which are neither voluntary contributions nor endowment. I need not say that if the point had been decided in that case I should loyally follow it, but all that is to be found is the suggestion of a difficulty which Lindley M.R. foresees but which he expressly refrains from deciding. With the greatest respect I do not share, at all events to so great an extent, the feeling of difficulty which he indicated with regard to this particular point. The question in his mind was this, that where a charity, which is not a mixed charity because it has no endowment, is not entirely supported by voluntary contributions in the ordinary sense—because some of the money acquired by it is acquired in a way which might not in the ordinary sense be described as a voluntary contribution—it cannot be brought within the exemptions in s. 62 inasmuch as those exemptions are confined to charities wholly maintained by voluntary contributions, or partly maintained by voluntary

(1) [1898] 2 Ch. 687, 697.

subscriptions and partly by income arising from any endowment. NEVILLE J. Therefore, he says, if the charity has some third source of revenue, how can it be said that the charity comes within the exemptions of s. 62? It appears to me that the answer to that is this. In interpreting an Act of this kind one must consider what is the matter with which the Legislature is dealing, and I think that the Legislature for the purpose of this Act has divided all means of subsistence into two categories, endowment and non-endowment, and that everything which is not endowment within the definition in the Act is non-endowment and therefore embraced by the term "voluntary contribution" in the Act. In the *Clergy Orphan Case* (1) the Court of Appeal held that no property the capital of which is applicable at the discretion of the governors for general purposes is endowment at all. I am of opinion, therefore, that this society is, within the meaning of the Act, wholly maintained by voluntary contributions, and that the answer given by the society to the purchaser's requisition is established, and that it can make a good title without the consent of the Board of Education. The summons will be dismissed with costs.

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Solicitors: *Banks, Kendall & Taylor, Liverpool; Radcliffe, Cator & Hood, for Gibbons & Arkle, Liverpool.*

(1) [1894] 3 Ch. 145.

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NEVILLE J.

In re GURNEY'S MARRIAGE SETTLEMENT.

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SULLIVAN *v.* GURNEY.

July 18.

[1907 G. 614.]

Settled Estates — English Settlement — Real Estate in Scotland — “Capital Moneys” — “Improvements” on Scotch Real Estate — Jurisdiction — Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 2, sub-ss. 3, 10; ss. 21, 23, 33 — Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 13.

The Court has jurisdiction to sanction the outlay of capital moneys on improvements of real estate in Scotland settled by an English settlement.

Structural alterations to a public-house including the re-arrangement of the bar, required by a licensing authority on granting a renewal of the licence, are improvements on which capital moneys may be expended.

ADJOURNED SUMMONS.

By the settlement dated September 8, 1899, and made on the marriage of Mr. and Mrs. Gurney, after reciting (*inter alia*) that the wife was entitled in reversion expectant on the death of her father, E. Maccall, to (a) two third parts or shares of certain undivided real estates situate in the borough of Musselburgh, in the county of Edinburgh, (b) divers stocks, funds, and securities amounting to upwards of 7000*l.* in value, the husband and wife covenanted with the trustees (clause 4) that when the said property should fall into possession they would carry the said real estate to the trustees upon trust for sale as therein mentioned; and by clause 5 the wife assigned to the trustees her reversion in the said stocks, funds and securities upon the trusts therein mentioned. Clause 9 provided that the trustees should pay the income of the wife's property to the wife for life without power of anticipation, and after her death, if the husband survived, to the husband for life. By clause 10 the trustees, after the death of the husband and wife, were to stand possessed of the capital of the trust premises upon trusts for the issue of the marriage as therein mentioned. Clause 17 empowered the trustees at any time, at the written request of the husband and wife or the survivor of them, to lay out any sum not exceeding

1500*l.* from the sale (which the trustees were thereby authorized to make) of any part of the trust premises in the purchase of a messuage and land as a residence for the husband and wife or the survivor of them, such messuage and land to be situate in England or Wales; and further authorized the trustees during the lives of the husband and wife or the survivor of them at their written request, and afterwards, at the discretion of the trustees, to invest any moneys arising from any such sales as aforesaid in the purchase of the one undivided third part or share not thereby settled of the said real estate in Scotland, the two third parts whereof were thereby settled, the said messuage and premises so to be purchased to be conveyed to the trustees upon trust for sale as therein mentioned, and until sale the trustees were to permit the husband and wife to occupy the messuage and land so to be purchased as a residence, provided that the trustees should, subject to the right of the husband and wife to occupy the messuage and land so to be purchased as a residence, manage the same until they should be sold, with all the powers in that behalf of absolute owners. The property of the husband, consisting of a leasehold house in London and some personal estate, was also included in this settlement.

By a disposition in Scots form dated November 26, 1900, the husband and wife conveyed to the trustees the two third parts of the real estate in Scotland settled by the said marriage contract, subject to the life interest therein of E. Maccall.

In 1904 E. Maccall died, and the trust investments were transferred to the settlement trustees.

Part of the said real estate in Scotland was a public-house in Musselburgh let on lease for seven years from Whit Sunday, 1904, at the yearly rent of 28*l.* The public-house was a building of considerable age, and at the annual court for granting licences held in April, 1906, the licensing magistrates expressed themselves dissatisfied with the condition of the public-house and intimated that it was unsuited for modern requirements, and that extensive structural as well as internal alterations would have to be made in it. Such an intimation by licensing magistrates in Scotland was equivalent to notice that the licence would not be renewed if their requirements were not complied with. Plans

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NEVILLE J. were accordingly prepared, and at the annual licensing court held in April, 1907, the plans were submitted to the magistrates and formally approved, and the licence was granted on condition that the alterations shewn on the plans were carried out within as short a time as possible. The estimated cost of the alterations was 400*l.* The owner of the one-third of the Musselburgh property not included in the settlement desired the alterations to be carried out, and was prepared to bear his share of the expense, and the tenant of the public-house was willing to pay an additional rent of 5 per cent. on the 400*l.* There was evidence that if the licence was forfeited the tenant would be unable to pay the existing rent; that the rental value of the premises, if let otherwise than as a public-house, would be only about 10*l.* per annum; and that there was no chance of the licence being forfeited on the grounds of policy in connection with a reduction of licences, because it was the only licensed public-house in the street.

At the date of the marriage Mr. and Mrs. Gurney and the trustees of the settlement were all domiciled in England. There had been no issue of the marriage, and the husband and wife were now living apart. The summons was taken out by the surviving trustee of the settlement for the determination of the question whether the proposed alterations to the public-house constituted an "improvement" authorized by the Settled Land Acts, 1882 and 1890; and, if so, whether the moneys in the hands of the trustee were "capital moneys" within the meaning of the said Acts applicable in payment of the said improvements.

Jenkins, K.C., and *Paice*, for the summons. It will be greatly for the benefit of all parties interested under the settlement that the proposed alterations should be carried out in order that the licence may not be forfeited. It is submitted that the alterations are "improvements" within the meaning of s. 21 of the Settled Land Act, 1882, as extended by s. 13 of the Act of 1890; and it has been held that, where a settlement authorizes the trustees to invest in land or in any particular land, the trust funds in the hands of the trustees are moneys "liable to be laid out in the purchase of land" within the meaning of s. 33 of the

Act of 1882, and may be expended as "capital moneys" under the Act: *In re Hill* (1); *In re Soltau's Trusts* (2); and by sub-ss. 3 and 10 of s. 2 of the Act the word "land" means "any interest in land," and includes "an undivided share in land." The difficulty is that a doubt has arisen whether, having regard to s. 23 of the Act, which enacts that "capital money arising under this Act from settled land in England shall not be applied in the purchase of land out of England, unless the settlement expressly authorizes the same," the Court has jurisdiction to sanction this outlay of capital moneys on land in a foreign country. It is apprehended that, for the purposes of the Act, Scotland is a foreign country. There is no reported decision on the point, but in *Hood and Challis on Conveyancing*, 6th ed. p. 247, it is stated, in a note on the section, that in an unreported case of *In re Strousberg* (3), before Bacon V.-C. in 1886, the learned judge held that capital money might be expended upon improvements of land in a foreign country settled by an English settlement. We ask the Court to follow that decision.

Sheldon, for the wife, supported the application.

Cann, for the husband, took no part in the arguments.

NEVILLE J. I think the proposed alterations are "improvements" within the meaning of the Settled Land Acts, and it seems clear on the authorities that under the circumstances the trust funds in the hands of the trustee are capital moneys that may be expended on improvements. I will follow the decision of Bacon V.-C. in the case of *In re Strousberg* (3) and authorize the trustee to apply the moneys in his hands in payment of two-thirds of the improvements.

Solicitors: *Roscoe & Hincks; Rutter, Veitch & Bond.*

(1) [1896] 1 Ch. 962.

(2) [1898] 2 Ch. 629.

(3) Unreported.

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[1907 A. 9.]

June 11, 12;
13, 18, 19.

Light—Ancient Lights—Alteration of Building—Setting forward of Wall—Alteration in Height of Window—New Window receiving same Light as Old—Alterations made during Period of Acquisition of Right—Prescription Act, 1832 (2 & 3 Will. 4, c. 71), s. 3.

The question whether the right to the access of light to a building which has been enjoyed through one window is preserved upon an alteration of the building depends on the identity of light, not on the identity of aperture.

In cases where the light comes to any window over the roof of higher buildings at an angle, and the building is altered by advancing the wall in which the window is, the right to access of light will be preserved if any window or aperture in the new wall intercepts and gives access to any substantial part of the light which passed through the old window. It makes no difference that the new window or aperture is at a much higher level than the old window.

No alteration of a building, which would not involve the loss of a right to light when indefeasibly acquired, will, if made during the currency of the statutory period, prevent the acquisition of the right.

Scott v. Pape, (1886) 31 Ch. D. 554, followed.

Colls v. Home and Colonial Stores, [1904] A. C. 179, explained.

THE plaintiff in this action was, and had been for some time, the lessee and occupier of premises known as No. 5, St. John's Square, Cardiff, which he held, at the date of the commencement of this action, under a lease for ninety-nine years from February 2, 1903, at the annual rent of 100*l.* The defendant was the lessee for a long term of years of the adjoining premises No. 4, to the north of No. 5. At the date of this action the ground floor of the plaintiff's premises was used for the purposes of a shop and store, and the upper floors were used for the purposes of offices and a club. They had been occupied for similar purposes, so far as the amount of light required was concerned, since 1879. A part of the plaintiff's premises standing on what had originally been the back yard of No. 5, and facing towards the back yard of No. 4, was built round the east, south and west sides of a small area about 7 ft. 7 in. wide from east to

west and about 5 ft. 6 in. deep from north to south. The north side of the area adjoining the defendant's back yard was, until the defendant erected the buildings complained of in this action, left open except for a low wall which formed the boundary between the plaintiff's and defendant's premises. The defendant's back yard, which was about twenty-four feet in width from north to south, had then no buildings upon it. Beyond this yard on the north side were, first, some low buildings which did not affect the light in dispute, and beyond, at a distance of fifty-four feet from the plaintiff's premises, some very high buildings. All the light which reached the windows in the plaintiff's building on the south side of the area came to them over these high buildings and the defendant's yard. The plaintiff's building on the south side of the area contained, at the commencement of the action, a window on the first floor, and a skylight below it, both which the plaintiff claimed as ancient lights. The skylight extended from the top of the boundary wall to the wall of the plaintiff's building on the south side of the area. It sloped upwards to, and joined the wall at, the level of the first floor, and entirely covered in the area. This skylight gave light to a part of the plaintiff's shop on the ground floor.

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Shortly before the commencement of this action the defendant erected a wall and buildings fifty feet and upwards in height on his back yard close to and touching the boundary wall, thus converting the plaintiff's area into a well and causing a diminution in the light received by the plaintiff's window and skylight, which obviously amounted to a nuisance.

On January 2, 1907, the plaintiff brought this action for an injunction to restrain the defendant from permitting any wall or buildings erected by him above the height of the old boundary wall to remain, and from erecting any building on the site of his premises so or in such manner as to darken, injure, or obstruct, the ancient lights of the plaintiff.

The defendant denied that the plaintiff had ever acquired any prescriptive right to light, and alleged that, if he had, it had been lost and abandoned by alterations made in 1895. The plaintiff admitted that his present building was erected in 1895, but alleged that the existing first floor window and skylight

NEVILLE J. received practically the same cones of light coming over the said high buildings and the defendant's yard as had been received since 1879 through windows in former buildings on the south side of the plaintiff's area.

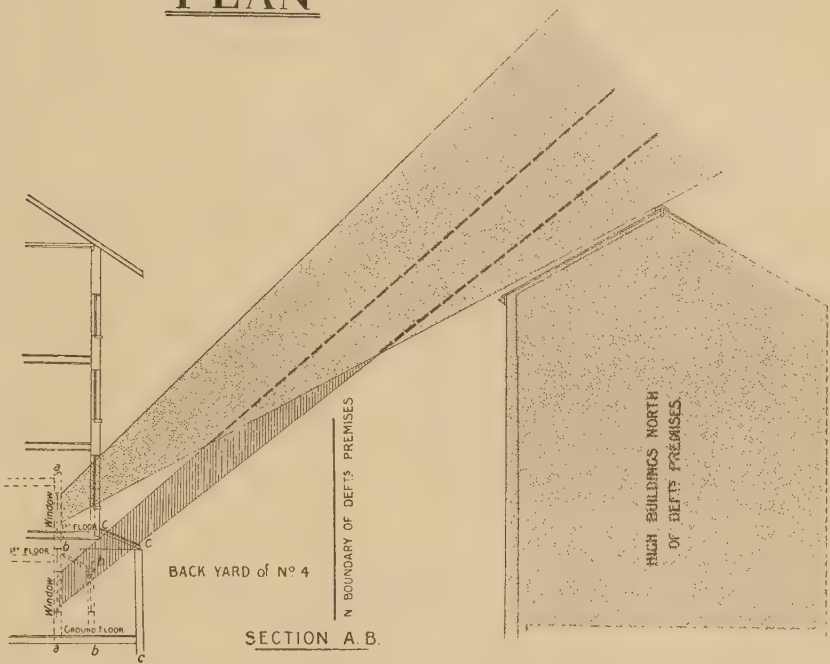
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There was a conflict of evidence as to the nature of the original building and the subsequent alterations made in it, but the facts as found by the judge were as follows.

In the year 1879 or 1880 the north wall of the plaintiff's building, i.e., the wall on the south side of the area, was about 10 ft. 6 in. distant from the boundary wall. There was a window on the first floor 6 ft. 10 in. wide and about six feet high and one on the ground floor 3 ft. 1 in. wide and between five and six feet high and three feet from the ground at the sill. Both windows were near the centre of the south side of the area.

In 1888 the ground floor wall of the old building was pulled down without disturbing the upper floors, which were carried on a girder extending along the whole of the south side of the area. A new ground floor wall was built about five feet nearer to the boundary wall. In this new wall a window was placed of the same size as the old window (it was stated that the actual old window was used), and in exactly the same position as the old window, except for the difference in plane. A lean-to glass roof or skylight was carried from the top of the new ground floor wall, which coincided with the top of the window, to the first floor level of the main building. The effect of this alteration was to add a strip of the area five feet wide to the ground floor room, which had been lighted by the original window, and the same light which had passed over the said high building and the defendant's yard to the old window now passed partly through the skylight and partly through the new ground floor window. In 1895 the whole of the plaintiff's premises were pulled down and rebuilt. The ground floor wall of 1888 was pulled down and the whole of the area on that floor thrown into the plaintiff's shop. The main wall of the building on the south of the area was brought forward to the position occupied by the ground floor wall of 1888, the first and upper floors of the building being, as before, carried on a girder, and a glass roof or skylight was put in extending

PLAN



aa Plaintiffs original wall
bbb Wall and skylight in 1888
ccc Wall and skylight at
commencement of action



Scale 8 feet to One inch.

NEVILLE J. from the boundary wall, which now served as the ground floor wall of the plaintiff's building, to the level of the first floor of that building as above described. The window on the first floor of the plaintiff's building which existed at the date of the action was put in at the same time. It was of the same size as the old window and opposite to it, but at a higher level, so that if the old window had been brought forward to the same plane only a strip about fifteen inches wide at the top would have coincided with any part of the new window. The whole, or a considerable part, of the light which passed over the said high buildings and the defendant's yard to the original ground floor window now passed through the skylight and reached the same part of the ground floor; and the whole, or a considerable portion, of the light which passed in the same way through the original first floor window now passed through the new first floor window. The section A B and ground plan on p. 503 are reproductions on a small scale of so much of the section and plan mentioned in the judgment as seemed necessary to make the description intelligible.

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*Peterson, K.C.*, and *Waddilove*, for the plaintiff. The main question in this action is whether the plaintiff has preserved the right to the light of which he enjoyed the access through the first floor and ground floor windows of his building as they existed in 1879. If the plaintiff receives through his present windows and skylight the same light as passed over the defendant's yard to his original windows, he has preserved his right: *National Provincial Plate Glass Insurance Co. v. Prudential Assurance Co.* (1)

[NEVILLE J. Has not that been altered by *Colls v. Home and Colonial Stores* ? (2)]

We submit not. No question was raised in that case as to alteration of windows or the way in which the right to light was acquired. All that it decided was that, when a plaintiff has established the right to light, he must also prove that the interruption complained of amounts to a nuisance. The law as to the effect of alterations continues as before. It was long ago

(1) (1877) 6 Ch. D. 757.

(2) [1904] A. C. 179.

settled that an alteration in the area of windows which are still in the same plane does not affect the right of access of light to any part of the area of the window which remains the same as before. The *National Provincial Case* (1) shewed that the plane of a window might also be altered without losing the right; *Bullers v. Dickinson* (2) shewed that the plane of the wall, in which the windows were, might be set back; and in *Scott v. Pape* (3) the Court of Appeal decided that it might be advanced, and laid down the general principle that the right acquired was a right to a certain light, and that alterations in the aperture made no difference so long as the light claimed was the same.

[NEVILLE J. referred to *Ecclesiastical Commissioners for England v. Kino*. (4)]

That rests on the same principle, and that principle was followed in *Greenwood v. Hornsey* (5) and *Smith v. Baxter*. (6)

In this case it has been proved that at least a considerable portion of, if not the whole of, the light which passed over the defendant's yard to the ground floor window and the first floor window of the plaintiff's original building has continued ever since, up to the date of the defendant's erecting his new buildings, to pass into the same floors of the plaintiff's building by the apertures existing from time to time. The plaintiff is bound to prove that the obstruction of light caused by the defendant's buildings would have amounted to a nuisance in 1879: *Colls v. Home and Colonial Stores* (7); *Ankerson v. Connelly* (8); but in this case that is obvious.

*Jenkins, K.C.*, and *A. Adams*, for the defendant. The plaintiff's claim depends upon the theory that he is entitled to the particular light which in 1879 reached the first floor and ground floor windows respectively as they then existed; and it makes no difference that he now receives them through the new and higher first floor window and the skylight. That is not the law. It rests wholly on the judgment of Fry L.J. in *Scott v. Pape* (3), and that judgment is quite inconsistent

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(1) 6 Ch. D. 757.

(2) (1885) 29 Ch. D. 155.

(3) 31 Ch. D. 554.

(4) (1880) 14 Ch. D. 213.

(5) (1886) 33 Ch. D. 471.

(6) [1900] 2 Ch. 138.

(7) [1904] A. C. 179.

(8) [1907] 1 Ch. 678.

NEVILLE J. with Lord Halsbury's judgment in *Colls v. Home and Colonial Stores* (1), where he says that the doctrine as to light does not rest upon any sort of proprietary right to the light itself. But, even if *Scott v. Pape* (2) is still law, it does not go nearly so far as the plaintiff's contention in the present case. In *Scott v. Pape* (2) the plaintiff had advanced his wall, but very slightly, and the new windows were in the same position as the old windows except for the difference in plane. In *Barnes v. Loach* (3) the wall was set back; in *Newson v. Pender* (4) the new wall was on the site of the old, and substantial parts of the old windows were in the same position as the old. The result of all the cases is that the aperture must be substantially the same.

[NEVILLE J. In *Tapling v. Jones* (5) the House of Lords held that an alteration after the twenty years' enjoyment has expired and the right has been acquired does not lose the right. Are there any cases on the effect of alteration during the time in which the light is being acquired?]

So far as we are aware, there has been no decision on the point, and we submit that an alteration during that time is fatal. The enjoyment must be apparent during the whole time of acquisition, and such as could be obstructed: *Blanchard v. Bridges*. (6) Acquiescence by the owner of the servient tenement cannot be assumed from his not obstructing a window which is constantly changed.

The burden is on the plaintiff to shew that some part of the new window represents some substantial part of the old: *Fowlers v. Walker* (7); and he must also shew that the defendant's buildings would have created a nuisance before each of the alterations: *Ankerson v. Connelly*. (8) This burden he has wholly failed to discharge; there is no sufficient evidence of the position of the ground floor window in 1880, and none at all as to its height. Even if the light which reached the old ground floor window is now caught by the skylight, it is not shewn that it was

(1) [1904] A. C. 179, 182.

(2) 31 Ch. D. 554.

(3) (1879) 4 Q. B. D. 494

(4) (1884) 27 Ch. D. 43.

(5) (1865) 11 H. L. C. 290.

(6) (1835) 4 Ad. & E. 176.

(7) (1881) 51 L. J. (Ch.) 443.

(8) [1907] 1 Ch. 678.

so caught between 1888 and 1895. *Harris v. De Pinna* (1) NEVILLE J. shews that alterations of the aperture may destroy the right to the light.

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June 19. NEVILLE J. This is one of those cases relating to the obstruction of light, where there has been an alteration in the manner of receiving it, which are always cases of difficulty. The plaintiff and the defendant are the proprietors of adjoining premises in St. John's Square, Cardiff, No. 5 being the plaintiff's and No. 4 the defendant's. The models shew what has been done already in the way of building on the defendant's land, and the effect which that must have upon the plaintiff's building, and I do not think, although I do not put it as an admission, that it can be seriously contended that the buildings proposed to be erected would not create a nuisance to the plaintiff's premises supposing that he were entitled to the access of light to the windows as they stand. I think, if it were so, this would be one of the unusual cases in which not only would the right to light be infringed, but probably also the right to air, so high and so close to the plaintiff's premises are the buildings proposed to be erected by the defendant. But that is not the question which the Court in the present case has to consider. Whatever right of light the plaintiff has acquired has, so far as the evidence shews, been acquired since the year 1879, and during that time the plaintiff has more than once altered his premises so far as relates to the windows on the ground floor and on the first floor. Those are the only windows which are at present in question. Now I think, after hearing the evidence, that the facts of the case in this regard are shewn with sufficient accuracy by the diagram prepared by Mr. Corbett in connection with the section A B of the plaintiff's premises, the measurements on which I think have been proved. Assuming that the position of the old windows is correctly shewn in that section, I think that the plans produced, taken in connection with it, shew what the deprivation of light occasioned by the defendant's building will be, and the conclusion I have come to upon the evidence is that in that section the position of

(1) (1886) 33 Ch. D. 238.



NEVILLE J. the old windows is shewn with substantial accuracy. The chief difficulty is in regard to the window upon the ground floor, because it is said, and I think truly said, that no specific evidence as to the height of the window, which I think is proved to have been about 3 ft. 1 in. in breadth, has been given. But I think it is clear from the plan, and from the evidence of the witnesses, that there was a window existing in the external wall of that part of the plaintiff's premises in 1879 or 1880, and, having regard to the character of the building, to the height of the floor, and to the use to which this particular part of the building has been put, I think I should not be giving a reasonable effect to the evidence if I did not assume that that window was a window of ordinary and not exceptional character, and I take it that it was a window 3 ft. 1 in. in width, and between five and six feet in height.

That being so, the conclusion I have come to is this, that a substantial amount of light which comes in through the present skylight and the new window on the first floor reaches the places where the old windows on the ground and first floor were situated both before and after the alterations of 1888 and 1895, and I think that the buildings proposed by the defendant would occasion a nuisance to the occupants of the house as it exists, and to a house lighted, as to its first and ground floors, as the old house was both before and after the alterations.

The question then arises: On those findings of fact, is the plaintiff entitled to the relief that he claims? It has been argued that there has been such an alteration of his premises, both in 1888 and again still more conspicuously in 1895, as to prevent his acquisition of any right to light over the defendant's premises at all. That, I think, must depend upon the proper construction to be put upon s. 3 of the Prescription Act, which refers to acquisition of rights of light, taken in connection with the decisions of the Courts in respect of the matter. It is said that, except with regard to the term necessary for the acquisition of the right, the Prescription Act did not alter the law as it existed at the time the Act was passed. I think that is probably true, but if so the Act shews what the law at that time was, so far as the Act purports to state anything in connection with it. I do

not think that any distinction can be drawn between what, in NEVILLE J. the way of alteration, involves the loss of the right to light when once indefeasibly acquired, and what is sufficient to prevent the acquisition of the right during the twenty years. I say that, because it seems to me from the wording of s. 3 of the Act that the provision which makes the right indefeasible expressly refers to the earlier part of the section which relates to the access of the light. It is upon that, I think, that the decisions of the Courts proceed with regard to the loss of the easement resulting from alterations of the dominant tenement; the reasoning of those decisions is, I think, equally applicable to the question whether or no any right has been acquired during the currency, or any right has been lost after the expiration, of the twenty years. I am confirmed in this view by the judgment of Bowen L.J. in the case of *Scott v. Pape* (1), in which the question of alteration was considered, but was considered in connection with alterations made after the right had been indefeasibly acquired. I do not think that the main decision in *Scott v. Pape* (1) has been affected by the decision of the House of Lords in the case of *Colls v. Home and Colonial Stores* (2), so far as it relates to the question of loss of right by alteration of buildings. It seems to me that the question which has to be determined is, whether proof is necessary of identity of the window or aperture through which the light claimed has been admitted to the dominant building, or whether the true matter for investigation is the identity of the light which has been so admitted. How far the complete alteration of the character and structure of a building may serve to prevent the acquisition of light, or the enjoyment of it after it has been indefeasibly acquired, is a matter which I think I need not consider here, because, although the plaintiff's premises have undoubtedly been considerably altered by his various improvements, the character of the building remains substantially unchanged, and the use to which the light is put in the present case is to light a shop which has been in existence from 1879 or 1880 up to the present time. But it has been argued that the question must be determined by consideration of whether the window is in the same vertical plane, and to

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(1) 31 Ch. D. 554.

(2) [1904] A. C. 179.

NEVILLE J. what extent its position in the line of incidence of the light has been altered. In my opinion that is immaterial provided that the light which is claimed is the same light that has been enjoyed for twenty years. I think the real test is, as I said before, identity of light, and not identity of aperture, or entrance for the light. If that is so, then in the present case the plaintiff is entitled to an injunction, because I have come to the conclusion that not only do the defendant's buildings occasion a nuisance to the plaintiff's premises as they exist at the present time, but that they would have caused a nuisance to the plaintiff's premises had they remained simply in the enjoyment of the amount of light which has been enjoyed throughout the term from 1880 onwards. I think that undoubtedly the interference with the light occasioned by the defendant's buildings would have amounted to a nuisance in 1880 or at any time since, and that seems to me to be conclusive of the case. Of course, having regard to the standard laid down in *Colls v. Home and Colonial Stores* (1), in many cases where lights have been altered it may be a matter of extreme difficulty to shew that the interference is capable of legal remedy, having regard to the great difficulty of shewing whether what is existing under the present conditions would have been a nuisance under the conditions formerly existing. In this case I am relieved from any real difficulty with regard to that, owing to the character of the obstruction, because it is a wall of very considerable height, built quite close to the plaintiff's buildings. I think, therefore, that the plaintiff succeeds, and that an injunction must be granted in the present case, and that the defendant must pay the costs of the action.

The form of injunction granted was "against obstructing, so as to cause a nuisance, the access to the plaintiff's present window on the first floor and skylight on the ground floor of the light which formerly came to the old windows on the first and ground floors" shewn on the plans referred to in the judgment. There was also a mandatory order to pull down so much of the existing wall as so obstructed the light. A stay of the

(1) [1904] A. C. 179.

mandatory part was granted pending an appeal if notice were given promptly.

Solicitors: *Martyn & Martyn, for Edward Horley, Cardiff ;  
Bell, Brodrick & Gray, for Mackintosh, Dixon & Co., Cardiff.*

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J. R. B.

*In re* LONDON UNITED BREWERIES, LIMITED. NEVILLE J.  
SMITH v. LONDON UNITED BREWERIES, LIMITED.

1907  
July 24.  
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[1904 S. 2744.]

*Company—Debenture-holders' Action—Receiver and Manager—Insufficient  
Estate—Costs—Priorities—Bankruptcy of Receiver.*

Where a receiver and manager appointed by the Court properly incurs debts in carrying on the business, the Court will see that such debts are satisfied, either by the receiver, or, if the receiver becomes bankrupt or there is any other reason which makes it advisable, by payment direct to the creditors of the business out of the funds in Court available for that purpose.

In a debenture-holders' action a receiver and manager was appointed. The receiver, in carrying on the business of the company, incurred considerable debts without the leave of the Court or the consent of the debenture-holders, and subsequently became bankrupt. The funds in Court were the only assets of the company, and were insufficient to discharge the plaintiffs' costs of realization and the receiver's costs of carrying on the business. The trustee in bankruptcy of the receiver claimed that the funds in Court, less the costs of realization, ought to be paid out to him for distribution amongst the receivership creditors, whilst the plaintiffs contended that the receiver, having acted improperly, was not entitled to be indemnified out of the assets, and that the funds, less costs of realization, ought to be paid to the debenture-holders:—

*Held* (following *Batten v. Wedgwood Coal and Iron Co.*, (1884) 28 Ch. D. 317), that the funds in Court must be applied, first, in payment of the costs of realization; secondly, in payment of the receiver's costs.

*Held*, also, that the trustee in bankruptcy was not entitled to have the balance of the funds, after payment of costs of realization, paid out to him, but that the Court would distribute such balance subject to an inquiry whether any and what debts had been properly incurred by the receiver in carrying on the business.

#### FURTHER CONSIDERATION.

This was a debenture-holders' action to enforce and realize their securities. The plaintiff Smith and his two co-plaintiffs



NEVILLE J. were the trustees of four debenture trust deeds representing  
 1907 four sets of debentures issued by the company. Each of the  
 LONDON plaintiffs was also a debenture-holder, and respectively repre-  
 UNITED sented the first three sets of debentures. The fourth set of  
 BREWERIES, debentures was represented by a defendant debenture-holder of  
 LIMITED, that issue.  
*In re.*

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By the judgment in the action, dated December 13, 1904, usual accounts and inquiries were directed, and the plaintiff Smith was appointed receiver of the undertaking and property of the company and to manage its business, but he was not to act as manager beyond April 5, 1905, without the leave of the Court. The assets of the company consisted of (a) the leasehold brewery premises, and (b) the loose plant, stocks, and book debts. The receiver's managership was extended from time to time until August, 1906, when, under an order of the Court, he gave up possession of the brewery premises to the purchaser of a mortgage who had priority over all the debentures.

In November, 1905, the Master by his certificate found that the amount due for principal and interest on the four sets of debentures amounted to 6606*l.* 5*s.* 4*d.* In May, 1906, the loose plant, stocks, and book debts were sold, and the proceeds, amounting to 1026*l.* 3*s.* 9*d.*, were paid into Court.

The receiver, in carrying on the business as manager, incurred debts to upwards of 1456*l.* without the leave of the Court or the consent of the debenture-holders, and this sum, after certain payments authorized by the Court, had been reduced to 1275*l.* 19*s.* 8*d.* In January, 1907, the receiver was adjudicated bankrupt on the petition of a personal creditor, and his trustee in bankruptcy was added a defendant to the action. The liabilities of the receiver exceeded 1600*l.*, and included proofs for the 1275*l.* 19*s.* 8*d.* incurred by him as manager of the company's business. He had no assets. In the first two accounts carried in by him in the action a balance had been found due to him (including his remuneration), and this balance had been paid to him; but in the last account carried in by him in May, 1907, a balance of 171*l.* had been found due from him, and this balance had been paid into Court by his sureties.

Under orders of the Court various payments had been made out of the funds in Court, and the balance now in Court was about 740*l.*, and was the only asset of the company. The action now came on for further consideration, and the main question was how the 740*l.* was to be dealt with. The trustee in bankruptcy of the receiver claimed that the fund in Court, less costs of realization, ought to be paid out to him.

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*Jenkins, K.C.*, and *Gatey*, for the plaintiffs. This is a contest between the receiver's creditors and the first set of debenture-holders. The general rule as to priorities where the assets are insufficient is not disputed, but here the receiver is in default. He has acted improperly in incurring debts without the leave of the Court, and it is not fair that he should under the circumstances be indemnified out of the assets to the injury of the debenture-holders. The receiver's right of indemnity is a personal right, and not an asset of the bankruptcy. The receivership did not pass to the trustee in bankruptcy, and he has no claim whatever to the fund. The fund should be applied, first, in payment of the plaintiffs' costs of realization; secondly, in payment of the plaintiffs' costs, charges and expenses as trustees of the debenture trust deeds; and the balance should go to the first set of debenture-holders.

*Peterson, K.C.*, and *Eustace Smith*, for the trustee in bankruptcy. The rule as to priorities is laid down in *Batten v. Wedgwood Coal and Iron Co.* (1) The fund in Court, less the plaintiffs' costs of realization, ought to be paid out to the trustee in bankruptcy for distribution amongst the receiver's creditors. The receiver's right to indemnity is a chose in action, and vests in his trustee in bankruptcy. The receiver has a right to say to the Court, "Pay these creditors of mine whose debts have been properly incurred in carrying on the business," and his trustee in bankruptcy has the same right.

[NEVILLE J. Assume that to be so. Does that entitle the trustee to have the balance of the fund in Court, after discharging the costs of realization, paid out to him?]

All these creditors have proved in the bankruptcy. The

(1) 28 Ch. D. 317, 325.

NEVILLE J. trustee is really acting on their behalf, and payment out to him will be a payment to him on their behalf. It may be a matter of convenience whether payment is made to the trustee or to the creditors themselves.

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Jenkins, K.C., in reply. The right to indemnity is based on the merits of the receiver, and, unless he is himself entitled to be fully indemnified, his creditors have no claim. *Batten v. Wedgwood Coal and Iron Co.* (1) was the case of a meritorious receiver to whom a large sum was due, and does not apply to a case, like the present, of a bankrupt receiver who has acted improperly and was in default. There is no authority directly in point.

[*Peterson, K.C.* In *In re British Power Traction and Lighting Co.* (2) the receiver became bankrupt.]

There the point now argued was not raised, and the case helps me so far as it goes.

[NEVILLE J. It seems to me there must be an inquiry whether any and what debts were properly incurred by the receiver in carrying on the business.]

We do not object to an inquiry.

The defendants did not appear.

NEVILLE J. This is a debenture-holders' action, and unfortunately the funds realized in the course of the action will not be sufficient to discharge the liabilities incurred by the receiver and manager who was appointed by the Court, and who failed to discharge all the liabilities he incurred in carrying on the business and subsequently became bankrupt. A first and second account was brought in by the receiver shewing a balance due to him in respect of his receipts and payments, and that balance was paid to him. The question that remains is how the balance of some 800*l.* in Court is to be dealt with. I think I am bound to follow the rule which was laid down by Pearson J. in 1884 in *Batten v. Wedgwood Coal and Iron Co.* (1), which has been followed ever since, and that rule is as follows: That the order in which the assets under circumstances similar to these are to be applied is, first, in payment of the plaintiffs' costs of the realization of the

(1) 28 Ch. D. 317, 325.

(2) [1906] 1 Ch. 497.

property ; secondly, in paying the balance due to the receiver and manager ; thirdly, the costs, charges and expenses of the trustees of the deed ; fourthly, the costs of the two plaintiffs *pari passu* ; and, fifthly, the debenture-holders. Now in the present case the funds will not be sufficient to discharge the first two payments referred to in the judgment of Pearson J. ; but with regard to the second, the balance due to the receiver and manager, the matter stands in this way. The receiver has not paid certain liabilities which he incurred, and he has become bankrupt. His trustee in bankruptcy has appeared before me and argued, in the first instance, that the balance, after payment of the costs of the realization, ought to be paid to him ; and, secondly, that, if not, the creditors of the receiver, in respect of the liabilities properly incurred by him as manager, ought to be discharged in the same order as the balance due to the receiver would have been discharged had he discharged his obligations. With regard to the propriety of the trustee of the receiver—who, it seems, has been made a defendant as representing a bankrupt debenture-holder—appearing and arguing the case on the part of the receiver or himself, I say nothing. I think in all probability it will prove to be wholly immaterial. But I think that, whether the point had been argued on behalf of the trustee of the receiver or not, the Court would be bound to see that the funds are duly applied. In my opinion, where the Court has appointed a receiver who has incurred liabilities in the proper management of the estate which was given to him to manage, the Court will see that those creditors are satisfied, either by the receiver, or, in case the receiver should become bankrupt or there should be any other reason making it advisable, by payment direct to the creditors out of the funds in Court. It has been said that this would be to put the creditors of the receiver in a better position than the receiver himself ; but I think that is not so. It seems to me that in directing an inquiry with a view to payment to the creditors of the receiver, after the discharge of the costs of realization, I shall be putting those creditors in precisely the same position that they would have been in had the receiver paid them and then come for his indemnity against the estate. I cannot see that the estate is

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NEVILLE J. any the worse off because the payments are made direct to the
 1907 creditors instead of through the receiver to the creditors. The
 LONDON Court will see that those who properly gave credit to the receiver,
 UNITED who was managing under the authority of the Court, have their
 BREWERIES, debts discharged so far as the Court has funds in its hands. I
 LIMITED, am of opinion, therefore, that the order I ought to make on the
In re. present application is to tax and pay the costs of the realization
 SMITH of the property, then to direct an inquiry whether any and what
v. debts and liabilities have been properly incurred by the receiver
 LONDON which are still outstanding, and reserve further consideration in
 UNITED chambers; and as the fund is deficient the costs of the realiza-
 BREWERIES, tion will be taxed as between solicitor and client. The receiver
 LIMITED. must pass his final account, if he has not already done so.

Solicitors: *Skewes-Cox, Nash & Co.; Beaumont, Son & Rigden.*

H. L. F.

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June 21, 22,
 24, 25;
 July 8.

*Easement—Light—Enjoyment—Period before Action—“Consent or Agreement”
 —Prescription Act, 1832 (2 & 3 Will. 4, c. 71), ss. 3, 4.*

The effect of ss. 3 and 4 of the Prescription Act, as regards a claim to light, is that although the access and use of light have been enjoyed for twenty years without an interruption submitted to or acquiesced in for one year after notice to the party interrupted, and although the enjoyment has not been by some consent or agreement in writing, no right to the light is acquired under the Act, unless the enjoyment has been for the period of twenty years next before some suit or action in which the right is brought in question.

The right, if any, under the Act, by reason of enjoyment for twenty years, is inchoate only until it is established in legal proceedings.

Q. who was the tenant of a cowshed owned in fee simple by H., had in 1896 been in the actual enjoyment of the access of light over the adjoining land of V. to the windows of the shed for more than nineteen years without any interruption. In 1896, at the end of this period of enjoyment, V. obstructed the windows. C. at once removed the obstruction, and the windows remained unobstructed until 1898, when W., the surveyor of V., by his instructions again obstructed the windows. C. again removed the obstruction, but, being under the erroneous impression

that he was not entitled to an injunction to restrain the obstruction, he interviewed W., who told him that V. had again instructed him to obstruct the windows, and that he should do so unless C. gave him some document which would preserve the rights of V. PARKER J.

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C. thereupon (in January, 1899) wrote a letter, addressed only to W., saying, "I will give you one shilling per annum for the use of those eight lights you have boarded up in my cowshed." No answer was sent to this letter, but W. had it stamped as an agreement, and in reliance on it V. refrained from re-erecting the obstruction. The promised shilling was never paid. Payment of the arrears was demanded in June, 1903, but not made. In July, 1906, V. again obstructed the windows, and within a week H. commenced an action against V. for an injunction to restrain the obstruction:—

*Held*, that the letter was a "consent or agreement expressly made or given," for the purpose of the enjoyment of the access and use of the light, "by writing" within the meaning of s. 3 of the Act, and that as there had not been enjoyment, without such consent or agreement, for the twenty years next before the commencement of the action, H. had not a right to the enjoyment of the light under the Act.

The principle of *Simper v. Foley*, (1862) 2 J. & H. 555, and *Ladyman v. Grave*, (1871) L. R. 6 Ch. 763, not extended so as to exclude, in the computation of the twenty years next before action, a period during which enjoyment has been by a consent or agreement within s. 3 of the Act.

In July, 1875, John Parker sold to John Cox the business of a cowkeeper carried on by the former in Harris Street, Camberwell, in a dwelling-house with a wooden cowshed in the rear of it (below referred to as the dominant tenement). In 1877 Cox demolished the shed and built a more substantial one in its place, having eight windows looking south over the adjoining land (below called the servient tenement). In December, 1878, Cox obtained from the freeholders, three persons named Hyman, a lease for twenty-one years of the dominant tenement.

In 1883 one Van den Bergh became the owner of the servient tenement, which consisted of two houses in Havel Street, with ground in the rear and to the north thereof adjoining the dominant tenement. The access of light over the servient tenement to the windows in the new shed was uninterruptedly enjoyed for a period of over nineteen years terminating in July, 1896, when Van den Bergh caused the lights to be obstructed by boards across the windows nailed to posts fixed in the servient tenement. This obstruction remained only a short

PARKER J. time, as part of it soon fell down, and the rest was pushed  
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At the end of 1898 the windows were obstructed by one Wilson (Van den Bergh's surveyor) on the instructions of Van den Bergh, and the obstruction was again pushed down.

Cox then, after consulting his manager and a certain book of legal advice, came to the conclusion that, as he had not been in uninterrupted enjoyment of the light for twenty years when the obstruction of 1896 was erected, he had not acquired a right of light to the windows. Not being desirous of litigation, he had an interview with Wilson, who, on Van den Bergh's instructions, was about to re-erect the obstruction. At this interview Wilson told Cox that he must re-erect the obstruction unless Cox gave him some document which would preserve Van den Bergh's rights. Cox accordingly, through his manager, one Barton, sent to Wilson a document as follows :—

“Memorandum.

“January 18, 1899.

“From John Cox, Cowkeeper and Dairyman, 112, 114 and 116, Harris Street, Camberwell, S.E., to Mr. T. Wilson, 34, New Bridge Street, Ludgate Circus, E.C.

“Dear Sir,—I will give you one shilling per annum for the use of those eight lights you have boarded up in my cowshed.

“Yours truly,

“John Cox. (G. B.)”

No answer was received to this letter (although Wilson had it stamped as an agreement), and the obstruction was not re-erected. In reliance on the letter Van den Bergh refrained from re-erecting the obstruction. The promised shilling was never paid, although payment was demanded on June 5, 1903.

On July 5, 1906, Cox's successor in business, who had obtained a new lease from the Hymans, having heard that Van den Bergh was again about to obstruct the lights, consulted his lessor, who, by her solicitors, wrote to Van den Bergh, claiming the right of light and air to the windows, and stating that in case of interference with them the necessary steps to protect the interest of the owners would be taken. A few days afterwards the

windows were again obstructed, and on July 11, 1906 (after some correspondence), an action was commenced by Mrs. Hyman, the owner of the dominant tenement, against Van den Bergh and others, the owners of the servient tenement, for an injunction to restrain them from obstructing the "ancient lights" of the plaintiff. The action was tried before Parker J. on June 21, 22, 24 and 25, 1907.

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*Buckmaster, K.C.*, and *Ward Coldridge*, for the plaintiff. The plaintiff's right to the access of light to the cowshed over the land of the defendants is established by the evidence, and the plaintiff is entitled to an injunction to restrain the obstruction of the light: *Ecclesiastical Commissioners for England v. Kino*. (1)

*Mark Romer, K.C.*, and *Martelli*, for the defendants. The light has not been enjoyed for the period required by the Prescription Act, 1832, namely, the twenty years immediately preceding the commencement of the action, without interruption acquiesced in for a year: *Onley v. Gardiner* (2); *Battishill v. Reed*. (3) These cases have recently been followed by *Joyce J. : Damper v. Bassett*. (4) The three cases related to rights of way, referred to in s. 2 of the Act, whereas rights to light are referred to in s. 3; but s. 4 says that "each of the respective periods of years hereinbefore mentioned shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question, and no act or other matter shall be deemed to be an interruption, within the meaning of this statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorizing the same to be made." That section being general in its terms, the same principles are applicable to easements, whether under s. 2 or s. 3. The words "party interrupted" point to the conclusion that where the property is let the enjoyment of the tenant is referred to, although an interruption of the tenant's enjoyment operates against the landlord.

(1) (1880) 14 Ch. D. 213.  
(2) (1838) 4 M. & W. 496.

(3) (1856) 18 C. B. 696.  
(4) [1901] 2 Ch. 350.



PARKER J. In *Ladyman v. Grave* (1) Lord Hatherley L.C. said: "Undoubtedly, as in the case of all other easements, the accruing right to the easement is suspended, but only suspended, during the union of possession"—namely, the union of possession of both the dominant and the servient tenement—"so that if it had been shewn that the enjoyment had lasted for fifteen years and upwards, and then there had been an interruption by unity of possession, and then the enjoyment had lasted for five years more without the unity of possession, in such a case an enjoyment for twenty years could have been pleaded." But that is only a dictum, and cannot refer to a claim under the Prescription Act. The difference between claims under the common law and claims under the Act does not appear to have been brought before Lord Hatherley, and apparently neither s. 4 nor either of the cases, *Onley v. Gardiner* (2) and *Battishill v. Reed* (3), was cited before him. When the case was before Stuart V.-C. (4) the Vice-Chancellor said: "The statute positively requires an averment of an enjoyment of twenty years of an access of light without interruption for one whole year during the twenty years next before the bill was filed." The decision of the Vice-Chancellor was reversed on the facts.

*Simper v. Foley* (5) only decides that where an easement has been acquired it is not extinguished, but is only suspended by unity of possession; the decision does not relate to s. 4 of the Prescription Act or any right claimed under the Act.

[PARKER J. referred to *Hollins v. Verney*. (6)]

Even where there has been an enjoyment of the light for twenty years without interruption, the enjoyment does not create a right where it has been "by some consent or agreement expressly made or given for that purpose by deed or writing": Prescription Act, s. 3. There is a sufficient agreement here to satisfy that provision, and it is no objection to the agreement that the rent agreed to be paid never was in fact paid: *Bewley v. Atkinson*. (7) [They referred also, with reference to rights apart

(1) L. R. 6 Ch. 763, 768.

(2) 4 M. & W. 496.

(3) 18 C. B. 696.

(4) (1870) L. R. 6 Ch. 765, n.

(5) 2 J. & H. 555.

(6) (1884) 13 Q. B. D. 304.

(7) (1879) 13 Ch. D. 283.

from the Prescription Act, to *Daniel v. North* (1); *Barker v. Parker J. Richardson* (2); *Wheaton v. Maple & Co.* (3)]

*Buckmaster, K.C.*, in reply. Sect. 3 of the Prescription Act says that when the access of light has been "actually enjoyed" with the building "for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible . . . unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing." Now, assuming that s. 4 applies to the case of light, there had not in December, 1897, been any interruption for a year, and the owner of the dominant tenement had therefore been in uninterrupted enjoyment of the access of light, and that without any consent or agreement, for the full statutory period. His right to the access of light therefore became "absolute and indefeasible" under s. 3, and could not be displaced by what subsequently occurred. No stronger words could be used than the words "absolute and indefeasible," and the argument on behalf of the defendants amounts to a contention that the plain meaning of these words is not to be applied to them.

Then, when a right has become absolute and indefeasible by statute, why should it become defeasible unless an action is at once commenced to have it declared that it is absolute? It would be strange if what Cox did in 1899 should be held to upset the right he had gained. Under a mistake of law as to what his rights were he wrote a letter. His landlord, the freeholder, never even heard of the letter until after the action had been commenced. There is no evidence that the offer made by the letter was ever accepted—no answer to it was ever sent. If the offer had been accepted, Cox and those claiming under him would thereafter have been entitled to enjoy the right at a rental of a shilling per annum. The Court cannot go outside the document to ascertain what the real intention was. There was no such acceptance as to constitute an agreement, because the acceptance, if any, was not communicated to the person making the offer. Moreover, there was no consideration, because the right of

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(1) (1809) 11 East, 372.

(2) (1821) 4 B. & Al. 579.

(3) [1893] 3 Ch. 48.

PARKER J. access, supposed to be then acquired, already existed. The facts are very different from those in *Bewley v. Atkinson* (1), for in that case the agreement was come to between the two actual owners of the adjoining tenements, and the rent was paid, whereas it is not shewn here that the document ever came to the knowledge of the freeholders. There may be enjoyment of the access of light, although there is no tenant in possession and the house has been burnt down before action brought.

It is absurd to say that twenty years' enjoyment next before the issue of the writ must be proved, and that such proof is impossible where one's tenant has written a letter. Lord Westbury L.C., referring to s. 3 of the Prescription Act, says: "The right to what is called an ancient light now depends upon positive enactment. . . . It must also be observed, that after an enjoyment of an access of light for twenty years without interruption, the right is declared by the statute to be absolute and indefeasible, and it would seem therefore that it cannot be lost or defeated by a subsequent temporary intermission of enjoyment, not amounting to abandonment": *Tapling v. Jones*. (2) Sect. 4 is an enabling, not a disabling provision, and cannot be read into s. 3 for the purpose of defeating what has become an absolute and indefeasible right. *Damper v. Bassett* (3) is certainly not a decision that s. 4 is to be construed with s. 3.

[*Mark Romer, K.C.*, referred to *Aynsley v. Glover*. (4)]

PARKER J. referred to Carson's Real Property Statutes, p. 13; *Cooper v. Hubbuck* (5); *Parker v. Mitchell*. (6)

*W. F. Hamilton, K.C.* (*amicus curiæ*), referred to *Smith v. Baxter*. (7)]

If the defendants' contention is right, a landlord who has acquired the right of access of light to his property may have his rights taken away by a person whom he cannot control; and if a tenant can give away his landlord's rights by a letter, why should not a receiver or caretaker be in the same position? The observations of Lord Hatherley in *Ladyman v. Grave* (8)

(1) 13 Ch. D. 283.

(2) (1865) 11 H. L. C. 290, 304.

(3) [1901] 2 Ch. 350.

(4) (1875) L. R. 10 Ch. 283.

(5) (1862) 12 C. B. (N.S.) 456.

(6) (1840) 11 Ad. & E. 788.

(7) [1900] 2 Ch. 138.

(8) L. R. 6 Ch. 763, 768.

are in the plaintiff's favour, and there is no authority against the proposition that when once a landlord has obtained a right to the access of light the tenant cannot take away the right. PARKER J.

[*W. Hamilton, K.C.* (amicus curiæ), referred to *Glover v. Coleman*. (1)]

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The erection of a hoarding would not per se defeat the right, and the absence of a hoarding due to an unauthorized letter written by a tenant cannot do so. It is submitted that s. 4 is not to be too strictly construed, and is not to be read into s. 3; that the consent or agreement referred to in s. 3 must be the consent or agreement of a person whose rights are being interfered with, or at any rate that the document in the present case was not a consent or agreement within the meaning of s. 3.

*Cur. adv. vult.*

July 8. PARKER J. delivered the following written judgment:—In this action I find upon the evidence that the cowshed, the windows in which are in question, was erected in the year 1877, exactly as it now stands, and that the access and use of light to its windows has been since actually enjoyed without any interruption, within the meaning of s. 3 of the Prescription Act, 1832. Under these circumstances, if in 1898, when Wilson, on the instructions of Van den Bergh, the owner of the servient tenement, obstructed the windows in question, the owners or occupiers of the cowshed had instituted proceedings to restrain such obstruction, I cannot doubt that such proceedings would have been successful.

As a matter of fact, however, no such proceedings were instituted. Cox, the tenant of the cowshed, was under the erroneous impression that no such proceedings could succeed, and, not being desirous of litigation, had an interview with Wilson, who, on the instructions of Van den Bergh, was about to re-erect the obstruction which Cox had already removed. Wilson told Cox that he must re-erect the obstruction unless he received from Cox some letter or document which would preserve Van den Bergh's rights.

Cox accordingly, through Barton, his manager, wrote and sent

(1) (1874) L. R. 10 C. P. 108.



PARKER J. to Wilson the letter of January 18, 1899. Wilson had the letter  
 1907 stamped as an agreement, and in reliance on such letter refrained,  
 HYMAN on Van den Bergh's instructions, from re-erecting the obstruction.  
 v. He does not appear to have acknowledged the letter, or asked for  
 VAN DEN payment of the one shilling a year mentioned in it until June 5,  
 BERGH. 1903, when he wrote a letter to Cox asking for the arrears to  
 date. Cox took no notice of such letter, and the one shilling a  
 year was never, in fact, paid.

Just before the institution of this action the owners of the servient tenement, being desirous of building, again obstructed the windows of the cowshed, and the owner of the cowshed accordingly instituted this action for an injunction, Barton, the present tenant, not being made a party.

/ The plaintiff's claim is based entirely on the Prescription Act. She might possibly have set up a title based on a presumed grant; but she has not done so, and if she had asked leave to amend in that respect I could only have given it upon some such terms as those upon which similar leave was given in *Smith v. Baxter*. (1) The plaintiff's rights must therefore be considered with reference to the provisions of the Prescription Act only, and ss. 3 and 4 of that Act are the material sections to be considered. These two sections, read together, seem to me to provide that where the access and use of light to and for any building shall have been actually enjoyed therewith for the full period of twenty years next prior to some action or suit in which the right to such access or use shall have been or shall be brought in question without any such interruption as mentioned or referred to in the two sections, then the right to such access and use shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing. If this be so, it follows that no right to light can be acquired under the Act without an enjoyment for twenty years next before some action or suit in which the right is brought in question. In other words, however long the period of actual enjoyment, no absolute or indefeasible right can be acquired till the right is brought in

(1) [1900] 2 Ch. 138.

question in some action or suit. Until it be so brought in question, the right, if it can be called a right, is inchoate only, and in order to establish it when brought in question the enjoyment relied on must be an enjoyment for the twenty years next preceding some such action or suit. This appears to be the effect of the decision of Erle C.J. and Willes and Byles JJ. in *Cooper v. Hubbuck* (1), which, it is to be observed, was a decision relating to an alleged easement of light.

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It has, however, been argued that the plaintiff in this action can rely upon the actual enjoyment of the access and use of light to the windows of the cowshed between December 31, 1877, and January 18, 1899, as sufficient to confer upon her a right under the Act, even although she cannot rely on the actual enjoyment of such access and use between January 18, 1899, and the institution of this action by reason of the document signed by Cox on January 18, 1899, and the concluding clause of the 3rd section of the Act. In other words, it is argued that the plaintiff can rely on a period of enjoyment which is not next before this action or any other action or suit in which her right has been brought in question. It is said that in this respect the easement of light differs from all other easements capable of being acquired by statutory prescription; and two authorities are cited in support of this view, both decisions of Lord Hatherley, one of them being *Simper v. Foley* (2) and the other *Ladyman v. Grave*. (3) In the first of these cases there had been actual enjoyment of the access and use of light from 1815 to May 9, 1837. On May 9, 1837, the dominant and servient tenements both came into the possession of the same occupier, and remained in such possession until February 28, 1860. Consequently from May 9, 1837, to February 28, 1860, there could have been no such actual enjoyment as contemplated by the Prescription Act: *Harbidge v. Warwick*. (4) From February 28, 1860, to the filing of the bill in September, 1861, there was, however, such actual enjoyment. Lord Hatherley (then Vice-Chancellor Wood) held that on May 9, 1837, an easement of light had been acquired under the Prescription Act, and, though suspended during the unity of

(1) 12 C. B. (N.S.) 456.

(3) L. R. 6 Ch. 763, 768.

(2) 2 J. & H. 555.

(4) (1849) 3 Ex. 552.

PARKER J. occupation, revived when such unity of possession ceased. In 1907 other words, he held that an easement of light could be acquired under the Act by a twenty years' actual enjoyment determining over twenty years before the suit in which the right was first brought in question. The decision is the more remarkable because the case of *Battishill v. Reed* (1) had been cited in argument, and in that case Jervis C.J. had decided the precise contrary in the case of a right of way claimed under the statute, and had further laid it down that in computing the twenty years next before suit the interval during which there had been no enjoyment within the meaning of the Act, because of the unity of occupation, could not be cut out or ignored. There is an earlier case of *Onley v. Gardiner* (2), which is to the same effect as *Battishill v. Reed* (1), but does not appear to have been cited in *Simper v. Foley*. (3)

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In *Ladyman v. Grave* (4), the second of the two cases on which the plaintiff's counsel relied, there had been actual enjoyment of the access and use of light at any rate from 1804 to 1817, and possibly from 1804 to 1830. Certainly from 1830, and possibly from 1817 up to the filing of the bill, there had been a unity of occupation preventing such actual enjoyment. Stuart V.-C. decided on the evidence that there was no such unity of occupation during a period of twenty years after 1804, and therefore that a right to light had been acquired before the Prescription Act was passed, which right was only suspended during the unity of occupation. Lord Hatherley, on the other hand, decided on the evidence that the unity of occupation had commenced as early as 1817, and that therefore no right could have been acquired. But Lord Hatherley's judgment contains some very important dicta. He approves of the decision in *Harbidge v. Warwick* (5), to the effect that there can be no actual enjoyment such as is mentioned in s. 3 of the Prescription Act during a period of unity of occupation. "That case," he says, "went upon this simple ground—that this" (i.e., the right to light) "was an easement like any other easement, and that the law

(1) 18 C. B. 696.

(3) 2 J. & H. 555.

(2) 4 M. & W. 496.

(4) L. R. 6 Ch. 763, 768.

(5) 3 Ex. 552.

does not allow the co-existence of an easement in land with the possession of the land itself. Undoubtedly," he continues, "as in the case of all other easements, the accruing right to the easement is suspended, but only suspended, during the union of possession. So that if it had been shewn that the enjoyment had lasted for fifteen years and upwards, and then there had been an interruption by unity of possession, and then the enjoyment had lasted for five years more without the unity of possession, in such a case an enjoyment for twenty years could have been pleaded. The interruption (if such it may be called) by the unity of possession is not an interruption in the sense indicated by the statute, which means an adverse interruption. It appears to me, that if it be made out that for some six or seven years before the twenty years had elapsed, and before the absolute right had been acquired, the persons who had occupied this house at the same time enjoyed the use of the garden or orchard behind, and if the enjoyment of the light, after the cessation of the unity of possession, has not lasted long enough to make up, together with the previous term of enjoyment, the period of twenty years, then the right is not acquired." He says later that a man can have no interest enabling him to prevent his neighbour's building on his own land until the statutory time has arrived which confers the right, but that the Legislature has provided, for the purpose of cutting short litigation, that after an enjoyment for twenty years the right *eo instanti* must be taken to have accrued.

It is to be observed, with reference to *Ladyman v. Grave* (1), that the passages I have quoted from Lord Hatherley's judgment were in no way necessary to his decision, which turned entirely upon the facts, but were dicta merely, though the dicta of a very learned and careful judge. Further, neither *Battishill v. Reed* (2) nor *Onley v. Gardiner* (3) appears to have been cited. The cases of *Clayton v. Corby* (4) and *Pye v. Mumford* (5), which were cited, are cases in which the period during which a tenant for life had been in occupation of the servient tenement had been excluded

(1) L. R. 6 Ch. 763, 768.

(3) 4 M. &amp; W. 496.

(2) 18 Q. B. 696.

(4) (1842) 2 Q. B. 813.

(5) (1848) 11 Q. B. 666.



PARKER J. in computing the periods pleaded pursuant to the express provisions of the statute, and do not lay down any general principle. 1907  
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—  
*Onley v. Gardiner* (1) and *Battishill v. Reed* (2) have recently been followed by Joyce J. in *Damper v. Bassett* (3), a case which related to a right of way claimed under the Prescription Act. It was argued that the authority of those cases had been impaired by *Simper v. Foley* (4) and *Ladyman v. Grave* (5), but the learned judge considered himself bound by those decisions, suggesting that *Simper v. Foley* (4) and *Ladyman v. Grave* (5) might possibly be explained on special considerations relating to the easement of light. It is true that the acquisition of a right to light is governed by ss. 3 and 4, whereas the acquisition of a right of way is governed by ss. 2 and 4. It is further true that an easement of light, being a negative easement, differs from a right of way, and that this difference may account for the difference in the nature of the enjoyment required by the Act for its acquisition. But I am unable to see how any of these considerations afford a justification for giving s. 4, which applies to the periods mentioned in all the foregoing sections of the Act, a meaning or effect in the case of the period mentioned in s. 3 different from its meaning and effect in the case of the periods mentioned in s. 2. This being so, although I might feel myself bound by *Simper v. Foley* (4) and *Ladyman v. Grave* (5) in cases relating to unity of possession, I am clear that I should not be justified in extending the principle of *Simper v. Foley* (4) and *Ladyman v. Grave* (5) so as to exclude in the computation of the twenty years next before action or suit a period during which the enjoyment of the light had been by some consent or agreement expressly made or given for that purpose by deed or writing.

It remains, therefore, to consider whether during the twenty years next preceding this action the access and use of light to the windows of the cowshed was in fact enjoyed by virtue of some such agreement or consent. The defendants rely on the letter of January 18, 1899. That letter was, in my judgment,

(1) 4 M. &amp; W. 496.

(2) 18 C. B. 696.

(3) [1901] 2 Ch. 350.

(4) 2 J. &amp; H. 555.

(5) L. R. 6 Ch. 763.

written in order to induce Van den Bergh not to re-erect the obstruction to the windows; and, assuming it is a consent or agreement in writing within the meaning of the Act, I must, I think, find as a fact that it was written and sent to Wilson, Van den Bergh's agent, expressly for the purpose of securing continued enjoyment of the access and use of light. Again, in my judgment, Wilson, on Van den Bergh's instructions, refrained from re-erecting the obstruction in reliance on this letter, and, but for the letter, would have re-erected the obstruction. I must find, therefore, that for some part of the twenty years the enjoyment of light was in fact due to the letter having been written, although no payments under the letter appear to have been made. The real question on this part of the case is, therefore, whether the letter is a sufficient consent or agreement in writing within the meaning of the 3rd section of the Act.

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It was argued in *Bewley v. Atkinson* (1) that the 3rd section of the Act contemplated an agreement or consent signed, if not by the owners of both tenements, at any rate by the owner of the servient tenement. It was held, however, that in the case of an agreement the signature of the owner of the dominant tenement was sufficient. The agreement in that case contained an acknowledgment that the windows in question had been put out and remained upon the leave and indulgence of the owner of the servient tenement, and a promise to block the same upon request, and until request made to pay sixpence a year in consideration of such indulgence.

It will be noticed that the agreement in *Bewley v. Atkinson* (1) was between two owners, whereas in the present case the agreement, if any, is between the tenant of the dominant and the owner of the servient tenement, and such agreement is only signed by the tenant of the dominant tenement. It was argued, therefore, that the present case is distinguishable from *Bewley v. Atkinson* (1) and governed by different considerations. The Act itself does not specify the persons who must be parties to the agreement. It merely says that the agreement must be in writing expressly made for the purpose of the enjoyment, and that the

(1) 13 Ch. D. 283.

PARKER J. enjoyment must be due to the agreement. In my judgment, however, the consent or agreement referred to in the Act must be some consent or agreement which prior to the Act would have been fatal to the acquisition of the easement by prescription at common law or presumption of grant.

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Before the Act the enjoyment necessary for the acquisition of an easement in either of these two ways had to be an enjoyment as of right. If the enjoyment was due to an agreement or consent, it was held to negative enjoyment as of right at the moment when the agreement was made, or the consent given for the making of the agreement, or the asking for or acceptance of a consent or licence acted as an admission that at that moment there was no right. The continuity of the enjoyment as of right, for the purpose of prescription at common law, was thus destroyed; and the continuity of the enjoyment for the purpose of a presumed grant was similarly destroyed if the agreement or licence had been made or given within the twenty years period relied on. If, however, the agreement or licence were made or given before the commencement of the twenty years period relied on, it did not negative the enjoyment as of right during that period, but by explaining and accounting for the enjoyment during such period it equally precluded the presumption of a grant. In applying those principles to the acquisition of easements under the Act it must be remembered, however, that there is an important difference between claims to easements under s. 2 and to light under s. 3. In the case of easements under s. 2 the enjoyment must still be of right; and therefore a parol consent or agreement given or made within the period relied on, whether it be twenty or forty years, will prevent the acquisition of the easement by breaking the continuity of the enjoyment as of right. It is only where it is given or made before the period of forty years that it must be by deed or writing. On the other hand, in the case of light, which is governed by s. 3, the enjoyment need not necessarily be as of right; and therefore the consent or agreement, in order to prevent the acquisition of the right, must be by deed or writing, whether it is given or made before or after the commencement of the statutory period: *Tickle v. Brown* (1);

(1) (1836) 4 Ad. &amp; E. 369.

*Gardner v. Hodgson's Kingston Brewery Co.* (1) The object of the provision requiring a deed or writing is clearly that the matter may not depend on parol evidence. PARKER J.

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Now the enjoyment which led to the acquisition of rights by prescription at common law or presumption of grants was an enjoyment by the occupier or person in possession. The owner of the dominant tenement, if not in occupation, could not found his claim upon enjoyment by himself, but he could claim the benefit of the enjoyment of the occupier. In principle, therefore, where the enjoyment of the occupier was not such as required by the doctrine of the Courts for the acquisition of the right, the owner could acquire no rights at all. In other words, if the occupier had asked for some consent or entered into some agreement, the effect of which, if he had been the owner, would have been to prevent the enjoyment as of right necessary for the acquisition of the easement at common law or by presumption of grant, the owner could be in no better position. I think I ought to apply the same principle in construing the Prescription Act, and it accordingly follows that, in my judgment, an agreement made and signed by the tenant of the dominant tenement for the purpose of securing the access and use of light to windows, and to which such access and use is actually due, is a sufficient agreement in writing within the meaning of s. 3 if signed by the tenant in possession of the dominant tenement. I can find no authority exactly in point, but it is quite clear from *Beasley v. Clarke* (2) that where the tenant had asked for permission to use a way, no right could be acquired under the Act by the landlord.

It was argued that this construction of the section would put it in the power of a tenant to destroy his landlord's right, but this argument seems to me to be fallacious in the tacit assumption that the landlord has any rights until he has acquired them by some means known to the law; and, as I have said before, no right is really acquired under the Prescription Act until there has been the necessary enjoyment for the statutory period, which must end in the institution of an action or suit. Of course, if the agreement were collusive and entered into in fraud of the

(1) [1900] 1 Ch. 592; [1901] 2 Ch. 198. (2) (1836) 2 Bing. N.C. 705.



PARKER J. landlord, the jury, or the judge sitting as jury, would no doubt  
1907 refuse to hold that the enjoyment was due to the agreement, and  
HYMAN the landlord would be thus protected. But assuming the agree-  
v. ment to be entered into bona fide for the purpose of securing,  
VAN DEN and does secure, to the tenant the enjoyment he desires, it does  
BERGH. not appear to me that the landlord is really injured. It should  
be noticed that the Prescription Act affords a new and alternative  
manner of acquiring rights, and does not prevent their acquisition  
either by prescription at common law or presumption of  
grant. There is no reason, therefore, why anyone should consider  
himself aggrieved if the provisions of the Act do not meet the  
particular circumstances of his own case.

It remains to notice two other points which were raised in  
argument. It was said that the letter constituted an offer which  
was never accepted, or at any rate that its acceptance was never  
communicated to Cox. In my judgment there is no doubt that  
the offer was accepted, and that in reliance on the letter the  
windows were left unblocked; and I think I am justified in  
inferring from the circumstances of the case that Cox knew the  
windows remained unblocked because of the letter. In other  
words, I can infer that he knew that the offer had been accepted.  
Again, it was said that, according to its true construction, the  
offer was to buy the right to light in consideration of an annuity  
of one shilling. I do not so read the letter. It appears to me  
to be a promise to pay one shilling annually if and so long  
as the windows were permitted to be used.

Under all the circumstances I have come to the conclusion that  
the plaintiff has not acquired a right to the access of light to the  
windows under the Prescription Act, and that the action fails.

With regard to costs, I cannot help thinking that a considerable  
part of the costs incurred has been due to the defendants' allegations  
that, except during the period during which enjoyment was had by  
virtue of the letter of January 18, 1899, the lights had been blocked.  
I am of opinion, therefore, that, though the defendants are entitled  
to the general costs of the action, they are not entitled to such costs  
so far as they have been increased by that issue, and that the plaintiff  
is entitled to her costs so far as they have been so increased. I will therefore

direct taxation on that footing, with the usual set-off, unless, PARKER J. indeed, the parties are content that there should be no order as to costs at all.

Solicitors for plaintiff: *Colyer & Colyer*.

Solicitor for defendants: *W. B. Styer*.

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SAMUEL JOHNSON & SONS, LIMITED v. BROCK. PARKER J.

[1906 S. 523.]

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*Limitation, Statutes of—Mortgagee—Extinguishment of Title of Second Mortgage—Effect of Possession of First Mortgagee—Non-suspension of Statutory Period—Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), ss. 2, 3, 5—Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), ss. 1, 2.*

When the right of action of a mortgagee to recover land has accrued, the possession of the land by a prior mortgagee does not suspend the running of the period of limitation against the subsequent mortgagee.

The dictum of Romer J. in *Kibble v. Fairthorne*, [1895] 1 Ch. 219, not followed.

*Trustees, Executors, and Agency Co. v. Short*, (1888) 13 App. Cas. 793, explained.

HENRY HIRST, being then owner in fee simple of two houses, Nos. 2 and 4, Cherry Lane, Doncaster, on May 1, 1889, mortgaged the same to the Great Northern Building Society to secure 230*l.* and interest.

On February 9, 1892, Henry Hirst, being then in possession or receipt of the rents and profits of the same property, mortgaged it and other property to E. A. Johnson (subject to the mortgage to the building society) to secure 473*l.* and interest.

In September, 1901, the building society entered into possession of the Cherry Lane property, and the society remained in possession until after its own mortgage was paid off (after the commencement of the present action).

In July, 1902, E. A. Johnson sold his business and the assets thereof, which included the mortgage of 1892, to Samuel

PARKER J. Johnson & Sons, Limited, but the mortgage was not transferred.

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In December, 1902, E. A. Johnson died, having appointed F. Johnson and G. H. Johnson his executors.

On February 9, 1906, the present action was commenced by Samuel Johnson & Sons, Limited, F. Johnson, and G. H. Johnson, against Henry Hirst and certain persons claiming under him, for foreclosure of the property comprised in the mortgage of 1892.

Two of the defendants, Henry Hirst and J. T. Hirst, pleaded that no payment in respect of the mortgage of 1892 had been made since July 12, 1892, and that all claims in respect of that mortgage were barred by the Statutes of Limitation.

The building society was not a party to the action.

The action was tried on July 11, 1907.

*Christopher James*, for the plaintiffs. In 1901, when the building society went into possession of the mortgaged premises, the second mortgagee was not barred by any Statute of Limitation. But for the entry of the first mortgagees the plaintiffs would have been statute-barred in July, 1904: Real Property Limitation Act, 1874, s. 1. The question to be determined is whether the possession of the first mortgagees suspended the running of the statutory period. The mere existence of a prior mortgage would not have prevented the statutory period from running: *Kibble v. Fairthorne*. (1) But in that case Romer J. said (2): "The mortgagees under that mortgage were never in possession of the land. The mortgagor was, throughout the statutory period, in possession of the mortgaged property, and throughout this period the equitable mortgagee could have taken proceedings to enforce his right to the land. For instance, he could have brought a foreclosure action." There is, therefore, a distinction in the case where a prior mortgagee is in possession.

The interest of the mortgagor was a "future estate or interest" within the meaning of s. 3 of 3 & 4 Will. 4, c. 27, and s. 2 of the Act of 1874, and the right of the plaintiffs would not therefore first accrue until their estate became an "estate or interest in

(1) [1895] 1 Ch. 219.

(2) [1895] 1 Ch. 225.

possession." There was no adverse possession against the plaintiffs except during the period prior to the time when the first mortgagees took possession; their subsequent possession was not possession adverse to the plaintiffs, and only adverse possession is effectual to bar the right of action: *Willis v. Earl Howe*. (1) The rents and profits have ever since 1901 been received by the first mortgagees, who are really the mortgagees of the plaintiffs, and the possession of the former is in effect the possession of the latter. The plaintiffs could not have succeeded in ejectment without paying off the first mortgagees. [He also referred to *Trustees, Executors, and Agency Co. v. Short*. (2)]

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*Betterton*, for the defendants other than H. Hirst and J. T. Hirst.

*C. H. C. Noad* (*Sebastian* with him), for the defendants H. Hirst and J. T. Hirst. The plaintiffs are statute-barred, as twelve years have elapsed since their right of action first accrued. The Statutes of Limitation regard only the estate or title of the mortgagees. If *Romer J.* meant to say that if the prior mortgagees in *Kibble v. Fairthorne* (3) had been in possession his decision would have been different, the result would only be a dictum, not binding in other cases. When once the statutory period has commenced to run, the running cannot be suspended in any way: *Garner v. Wingrove*. (4) The interest of the mortgagor was not a future estate or interest. The possession of the first mortgagees was not the possession of the second mortgagees. If it were, the possession of the mortgagor would be their possession.

*Christopher James*, in reply.

PARKER J. It seems quite clear that, but for the fact which I am about to mention, the plaintiffs' action for foreclosure in respect of the Cherry Lane houses would be barred by the Statutes of Limitation applicable to the case. But it is suggested that as the mortgage to Johnson was a second mortgage, and during the period of twelve years required by the Acts to bar

(1) [1893] 2 Ch. 545.

(2) 13 App. Cas. 793.

(3) [1895] 1 Ch. 219.

(4) [1905] 2 Ch. 233.



PARKER J. a right of foreclosure the first mortgagee entered into possession, that period of twelve years, though it had commenced, was suspended during such possession, and that the plaintiffs therefore can sue for foreclosure in respect of the Cherry Lane houses.

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The sections of the Statutes of Limitation which are applicable in the particular case are s. 1 of the Real Property Limitation Act, 1874—which practically re-enacts s. 2 of the earlier Act, substituting twelve years for twenty years—and s. 3 of the earlier Act of 1833. Sect. 3 of the earlier Act provides how the statutory period is to be calculated, and the present case falls within that part of the section which contains these words: "And when the person claiming such land or rent shall claim in respect of an estate or interest in possession granted, appointed, or otherwise assured by any instrument (other than a will) to him, or some person through whom he claims, by a person being in respect of the same estate or interest in the possession or receipt of the profits of the land, or in the receipt of the rent, and no person entitled under such instrument shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time at which the person claiming as aforesaid, or the person through whom he claims, became entitled to such possession or receipt by virtue of such instrument." It seems to me that the plaintiffs here do claim in respect of an estate or interest granted to a person through whom they claim by an instrument other than a will by some person—namely, Henry Hirst—who at the date of the instrument was in possession or receipt of the rents and profits of the land in respect of the interest which he granted; and it is equally clear that no person claiming under the instrument is or has been in receipt of the rents of the land. Therefore the right of action is to be deemed to have accrued when Johnson became entitled to possession or receipt of the rents and profits; and that, as has been decided in many cases, is when his estate became absolute at law, namely, at the time fixed for payment of the mortgage money, after which the mortgagor has only an equity of redemption. This is clear from *Kibble v. Fairthorne*. (1)

(1) [1895] 1 Ch. 219.

It is suggested, however, that, since there was an outstanding mortgage at the date of the mortgage to Johnson, the mortgagor's interest was only a future interest, and could take effect only when the first mortgage was satisfied; and that accordingly a subsequent part of s. 3 of the Act of 1833 is applicable. That part of the section is as follows: "And when the estate or interest claimed shall have been an estate or interest in reversion or remainder, or other future estate or interest, and no person shall have obtained the possession or receipt of the profits of such land or the receipt of such rent in respect of such estate or interest, then such right shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession." In my judgment it cannot be held that the prior mortgage rendered the mortgagor's interest a future interest within the section. It is suggested, however, that there is something in *Kibble v. Fairthorne* (1) which ought to lead me to adopt the view that either the estate was a future estate within the section, or that the statutory period required to extinguish the right of action was suspended by the possession of the first mortgagee. In that case Romer J. says (2): "It has been suggested that the statutory period did not so operate because there was a prior outstanding legal mortgage which was in existence until 1886. But the mortgagees under that mortgage were never in possession of the land. The mortgagor was, throughout the statutory period, in possession of the mortgaged property, and throughout this period the equitable mortgagee could have taken proceedings to enforce his right to the land. For instance, he could have brought a foreclosure action." That seems to suggest that there might have been, in the judgment of Romer J., some difference if the first mortgagees had been in possession during the whole or part of the statutory period. But I do not think that, relying on that dictum, I ought to hold that the right of action was suspended, or that the interest of the mortgagor, when he created the plaintiffs' mortgage, was a future interest. If I so decided, I should be introducing a rule, which hitherto has never been laid down, that the statutory period, when once it has begun to run, can be suspended

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(1) [1895] 1 Ch. 219.

(2) [1895] 1 Ch. 225.

PARKER J. in any way. Of course, in *Trustees, Executors, and Agency Co. v. Short* (1) it was held that where an intruder took possession of and held the property for a period, and then went out of possession, the person who could complain of his intrusion was on his going out restored to the position in which he was before the intrusion. That means, as I understand it, not that there was any suspension of the right of action, but that the right of action in respect of the intrusion was gone; and, though the land thus becoming vacant was in law deemed to be in the possession of the person against whom the intrusion had been made, so soon as there was a fresh intruder there was a fresh dispossession, and a fresh right of action accrued. I do not think that the decision of the Privy Council was based on any suspension of a right which had once accrued, but on the ground that the old right of action was gone when the first intruder went out, and that a new right of action arose when the fresh intrusion occurred. That was the view which Kay L.J. took of *Trustees, Executors, and Agency Co. v. Short* (1) in *Willis v. Earl Howe* (2), to which I was referred.

It was further suggested in argument that this case was governed by s. 2 of the Real Property Limitation Act, 1874. I think, however, that when that section is looked into, especially having regard to the fact that it is in substitution, not for s. 3, but for s. 5 of the earlier Act, it merely provides for cases where the persons interested in the right of action for the recovery of land are more than one—for example, a tenant for life and remainderman—and is intended to give a remainderman or reversioner what may be called a separate and distinct right of action for the purpose of ascertaining the statutory periods necessary to extinguish the right. I notice that in the earlier Act the marginal note to s. 5—if I may refer to it, not for the purpose of construing the Act, but in order to shew what my own view is—is this, “Reversioner to have a new right.” That is my view of s. 2 of the Act of 1874, substituted as it is for s. 5 of the Act of 1833. The right to foreclose the Cherry Lane property, which was in the possession of the mortgagor when the mortgage to Johnson was granted, is barred by the statute,

(1) 13 App. Cas. 793.

(2) [1893] 2 Ch. 545.

although the first mortgagee has since been in possession of the PARKER J. mortgaged property.

Solicitors for plaintiffs and defendants (other than H. Hirst and J. T. Hirst): *Speechly, Mumford & Craig, for Mumford, Johnson & Co., Bradford.*

Solicitors for the defendants H. Hirst and J. T. Hirst: *Sims & Syms, for R. B. D. Bradshaw, Barrow-in-Furness.*

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F. B.

*In re* TURNER.

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[1905 T. 437.]

C. A.

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KEKEWICH  
J.

Nov. 29.

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C. A.

May 8.

IN the above-mentioned action (reported ante, p. 126) Kekewich J., while refusing, as against the defendant trustees, the first-mentioned summons by the solicitors for a charging order under the Solicitors Act, 1860 (23 & 24 Vict. c. 127), s. 28, at the same time granted to the solicitors, subject nevertheless to the payment to the trustees of their taxed costs, charges and expenses under the consent judgment in the action, a charging order as asked by the solicitors in their summons.

The order in the action, as ultimately entered, declared (1.), in answer to the question in the secondly mentioned summons, that the defendant trustees, as trustees of the said will, were entitled, in priority to all other parties to the action, to payment out of the property subject to the trusts of the will of their taxed costs, charges and expenses referred to in the consent judgment, and of their taxed costs as between solicitor and client of the secondly mentioned summons and of the adjournment thereof into Court; and (2.), in answer to the first-mentioned summons, that, subject to payment to the defendant trustees of their said taxed costs, charges and expenses, and their costs of the secondly mentioned summons as aforesaid, the applicant solicitors were entitled to a charge upon the property in the summons mentioned, as being "property recovered or preserved," for the amount of their taxed



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costs as such solicitors of and in reference to the action, and also for their costs of and incident to the said first-mentioned application and of the adjournment thereof into Court, and also for the costs thereafter ordered to be paid by them to the defendant trustees. And it was ordered that the applicant solicitors should pay to the defendant trustees their taxed costs, as between solicitor and client, of the first-mentioned summons and should add the costs so paid by them to the amount of their charge.

R. M.

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*July 26.*

*In re* RUSSIAN PETROLEUM AND LIQUID FUEL COMPANY, LIMITED.  
LONDON INVESTMENT TRUST, LIMITED *v.* RUSSIAN PETROLEUM AND LIQUID FUEL COMPANY, LIMITED.  
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*July 29, 31.*

[1907 R. 1254.]

*Company—Debentures—Pari passu Incumbrancers—Deposit of Debentures to secure pecuniary Assistance—Loan—Repayment of Money advanced—Debentures not returned to the Company—Extinction of Debentures—Further Loan—Keeping Debentures alive—Power to re-charge—Re-issue—Current Account.*

A company issued a series of debentures as floating securities on the terms that they should not without the authority of the debenture-holders create any charge on the mortgaged assets ranking *pari passu* with or in priority to the charge created by the debentures. They deposited 100,000*l.* of these debentures with a bank as collateral security for a credit of 150,000*l.*, by the terms of which the bank were to accept the company's drafts. This credit was not a current account, nor was anything advanced which was strictly speaking a loan. After this arrangement had been in operation for some time the amount due to the bank on the credit was paid off by the company. Immediately before this repayment the bank advanced 500*l.* to the company in order to avoid the deposited debentures being freed from all charges in favour of the bank; and the debentures were not given back to the company. The other debenture-holders claimed that the deposited debentures were dead, and could not be re-charged with the 500*l.* or any other sum:—

*Held* that, inasmuch as the whole amount for which the debentures were originally deposited as security had been paid off, the debentures themselves were spent, notwithstanding that they had not been handed back to the company, and that they could not be re-charged with the 500*l.* or any further sum.

*In re W. Tasker & Sons, Ltd.*, [1905] 2 Ch. 587, followed.

*Quere*, whether such a re-charge would be authorized by an article which gave power to the board to create, issue, make and give debentures for the purpose of borrowing money or for any other purpose.

*Per Warrington J.*: The rule that if debentures are issued and deposited as security, and the amount nominally secured by them is advanced on that security and is then paid off, no further charge on them can be created without creating an additional charge which purports to rank *pari passu* with the debentures of the original issue, applies to a current account.

#### MOTION.

The company was registered in 1898, and amongst the objects of the company specified in its memorandum of association were the following :—

“3. (N) To borrow or raise or secure the payment of money on any terms and conditions, and to create and issue mortgages, debentures and debenture stock (perpetual or redeemable) charged or not charged on the undertaking or all or any of the company’s property (including its uncalled capital) or revenue, and to establish and provide sinking and reserve funds for redemption or payment of obligations and liabilities.”

By article 85, sub-clause (F), the directors had power to “Borrow or raise any sum or sums of money on such security and upon such terms, as to interest or otherwise, as they may deem fit, and for the purpose of securing the same and interest, or for any other purpose, create, issue, make and give respectively any perpetual or redeemable debentures or debenture stock or any mortgage or charge on the undertaking or the whole or any part of the property present or future, or uncalled capital of the company, and any debentures, debenture stock and other securities may be made assignable free from any equities between the company and the person to whom the same may be issued. . . .”

In December, 1902, the company created an issue of 5000 debentures in bearer bonds of 100*l.* each, secured by a trust deed of January 6, 1903, made between the company of the one part and the Debenture Securities Investment Company, Limited, as trustees, of the other part. Clause 2 of the deed was as follows :—

“The company hereby charges in favour of the trustees its

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undertaking and all its property for the time being both present and future including its uncalled capital with the payment to the trustees of the debentures and the interest thereon and all other moneys intended to be hereby secured and such charge shall be a floating security and accordingly shall in no way hinder or prevent the company from selling alienating mortgaging charging leasing paying dividends out of profits or otherwise disposing of or dealing with such assets in the ordinary course of its business and for the purposes of carrying on the same; but the company is not to be at liberty without the authority of an extraordinary resolution of the debenture-holders to create any mortgage or charge on such assets ranking *pari passu* with or in priority to the charge hereby created. Moreover such charge is not to prejudice or affect any rights of the owners of claims against the company or any of its property arising from the company's operations in Russia as such rights now or may hereafter exist under the laws of the Empire of Russia and the charge hereby created is so created subject to such rights."

By clause 3 of the debentures "the bearers of the debentures of this issue and of the coupons attached thereto are and will be entitled *pari passu* to the benefit of and will also be subject to the provisions contained in" the trust deed. By condition 1: "This debenture is one of a series of like debentures issued or about to be issued by the company for securing principal sums amounting in the aggregate to 500,000*l.*" By condition 7 the debentures were to be redeemed by annual drawings. Four thousand of these debentures were issued to the public, and the plaintiffs the London Investment Trust, Limited, held 440 of them. The remaining 1000 debentures were issued in 1904, and deposited with Messrs. Brown, Shipley & Co. as security for a credit with that firm; Messrs. Brown, Shipley & Co. not being registered as the holders of the debentures. The terms of the credit were briefly stated in a letter of December 16, 1904, as follows:—

"Dear Sirs,—We hereby confirm the agreement made with your Mr. F. M. Ogilvy in terms of which we have arranged a

credit in your favour for 150,000*l.*, which amount has been distributed as follows:

50,000*l.* to ourselves,

50,000*l.* to Messrs. J. S. Morgan & Co.,

50,000*l.* to Messrs. Ogilvy, Gillanders & Co.,

and a copy of the 'terms of credit' is enclosed herewith.

"It is understood that all drafts under this credit will be lodged with us and by us be presented at the participating banks and that your cheque for the commission of 2 per cent. per annum will be handed to us in exchange for the acceptances. Further that you are to pay us a commission of  $\frac{1}{4}$  per cent. for our services in connection with the placement and management of the portion of the credit not retained by ourselves say 100,000*l.* = 250*l.* on the completion of the arrangements. We enclose the obligation for this credit, which please sign and return to us.

"Yours faithfully,

Brown, Shipley & Co."

The "terms of credit" referred to in this document were headed "Credit for 150,000*l.* in favour of the Russian Petroleum and Liquid Fuel Company, Terms of Credit;" and the 1st paragraph was as follows: "The credit is to be for one year say in six months drafts with one renewal. Banking commission 2 per cent. in all payable in advance. The credit to be secured by deposit of 100,000*l.* unissued balance of  $5\frac{1}{2}$  per cent. debentures redeemable by 10 per cent. per annum sinking fund at 105."

From an affidavit which had been filed by leave after the hearing before Warrington J. it appeared that the way in which the credit was operated upon by the company was as follows: The company drew five bills of 10,000*l.* each upon Messrs. Brown, Shipley & Co., who accepted the said bills and handed them back to the company. The company negotiated the bills and retained the proceeds.

The company further drew five bills of 10,000*l.* each upon J. S. Morgan & Co. and handed the bills to Messrs. Brown, Shipley & Co., who procured Messrs. J. S. Morgan & Co. to accept them. Messrs. Brown, Shipley & Co. handed the bills back to the company, who negotiated them and retained the proceeds.

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C. A.        The company further drew five bills of 10,000*l.* each upon  
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             way.

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All the fifteen bills for 10,000*l.* each were in similar form except as to the parties thereto, and were dated December 17, 1904, and made payable six months after date. Upon June 20, 1905, all these bills became due, and were renewed for six months. On December 23, 1905, the renewed bills became due, and were retired by Messrs. Brown, Shipley & Co. Some of the debentures which formed the security were drawn and redeemed under condition 7 of the debentures, and the sum of 13,440*l.*, representing their value, was paid to Messrs. Brown, Shipley & Co., reducing the debt due to them to 136,560*l.* They delivered to the company the 128 debentures which had been redeemed, and they were cancelled by the company. Arrangements were made for continuing the advance of the 136,560*l.* by means of bills at three months. In March, 1906, these bills were renewed, and on June 29, 1906, the renewed bills became due, and were retired by Messrs. Brown, Shipley & Co. Clauses 17, 18 and 19 of the affidavit were as follows:—

“17. Upon the 5th day of July, 1906, the company paid to Messrs. Brown, Shipley & Co. the sum of 51,000*l.* in part discharge of the sum of 136,560*l.* outstanding in respect of the said credit.

“18. Upon the 20th day of July, 1906, Messrs. Brown, Shipley & Co. advanced to the company the sum of 500*l.* by placing the same to the credit of the company upon a loan account and it was verbally agreed upon behalf of the company with Messrs Brown, Shipley & Co. that the said sum of 500*l.* should be secured by the 872 debentures deposited with Messrs. Brown, Shipley & Co. upon which security 85,560*l.* was then outstanding and thereupon the company paid to Messrs. Brown, Shipley & Co. the sum of 85,560*l.* leaving the sum of 500*l.* still owing.

“19. The intention of the company in leaving the said sum of 500*l.* still outstanding was to avoid the said debentures being freed from all charges or incumbrances in favour of Messrs. Brown, Shipley & Co.”

On December 31, 1906, 109 of the deposited debentures were drawn for redemption. Messrs. Brown, Shipley & Co. released these debentures, but received no payment; and they still retained the remaining 763 debentures. In December, 1906, Messrs. Brown, Shipley & Co. agreed to guarantee advances by Messrs. Robarts, Lubbock & Co. to the company to the extent of 45,000*l.* Various sums were advanced on this guarantee, but they had all been paid off, and only the 500*l.* remained due to Messrs. Brown, Shipley & Co. upon the security of the 763 debentures, which were still in their possession.

The London Investment Trust, Limited, took proceedings against the company, and now moved for an injunction restraining them from creating, by an issue of or by a charge upon any of the 763 debentures retained by Messrs. Brown, Shipley & Co., any charge upon the property comprised in the trust deed purporting to rank, with regard to such property, *pari passu* with the remainder of the debentures therein secured, and from applying to the redemption of the said debentures or any of them, any sum in excess of the amount now secured thereon out of the amounts which ought under condition 7 of the debentures to be applied in redemption of the debentures of the said issue.

The motion was heard before Warrington J. on July 26, 1907.

*Rowden, K.C.*, and *A. R. Kirby*, for the plaintiffs. The 763 debentures deposited with Messrs. Brown, Shipley & Co. have been paid off except to the extent of 500*l.* Any further borrowing by the company on the security of those debentures would in effect be a re-issue of them, and therefore a breach by the company of its contract with the other debenture-holders of the same series. The case is governed by *In re W. Tasker & Sons, Ltd.* (1), the only difference being that in that case the formality of handing back the debentures to the company was gone through. The principle established by *Otter v. Lord Taux* (2), that a mortgagor who pays off an incumbrance created by himself cannot set it up against a subsequent incumbrancer or creditor,

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(1) [1905] 2 Ch. 587.

(2) (1856) 2 K. & J. 650, 657; 6 D. M. & G. 638, 643.

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applies equally to a case where an existing incumbrancer or creditor ranks *pari passu* with the incumbrance paid off. The debentures in the present case are incapable of transfer except to the extent of 500*l.* A transfer for any larger amount would be a re-issue of the debentures.

*H. Terrell, K.C., and J. F. Carr (J. Eldon Bankes, K.C., with them), for the defendant company.* There is a distinction between the debenture debt and the trade debt. That is shewn in *In re Queensland Land and Coal Co.* (1) The debentures here were merely a security for the debt for which they were pledged. The position of debentures pledged as security is shewn in *In re Regent's Canal Ironworks Co.* (2) The charge here is for any sum which may at any time be due from the company on its current account not exceeding 100,000*l.* The payment off of the debt due on the company's current account was not a payment off of the debenture charge. The present case is distinguishable from *In re W. Tasker & Sons, Ltd.* (3) There an attempt was made to keep the debentures alive notwithstanding that they had been paid off. Here there never was a time at which Messrs. Brown, Shipley & Co. could be said to hold these debentures as trustees for the company. [They also referred to *In re George Routledge & Sons, Ltd.* (4)]

*Rowden, K.C., in reply.*

WARRINGTON J. The company in this case has issued to Brown, Shipley & Co. certain debentures some of which have been redeemed and some of which still remain in the possession of Brown, Shipley & Co. Those which now remain in the possession of Brown, Shipley & Co. are 763 in number for a nominal amount of 76,300*l.* They were originally issued as a collateral security for a debt. That debt amounted at one time to more than the nominal amount of the debentures issued. It is now reduced to a sum of 500*l.* The question is whether, as against other debenture-holders of the same issue, the company now has power to charge those debentures with any further sum, or whether the debenture-holders are entitled to say, "Our property on which

(1) [1894] 3 Ch. 181.

(2) (1876) 3 Ch. D. 43.

(3) [1905] 2 Ch. 587.

(4) [1904] 2 Ch. 474.

you have a charge shall be regarded as charged with 500*l.* and no more." That is the short and concise statement of the facts. The right on which the other debenture-holders, the plaintiffs, insist is founded upon a clause in the debenture deed, which provides that the company should not without the authority of an extraordinary resolution of the debenture-holders create any mortgage or charge on such assets ranking *pari passu* with, or in priority to, the charge thereby created.

The plaintiffs raise two points. They say, first, that the whole amount has been borrowed on the security of these debentures, and that, that having been done, no more can be borrowed on that security as against the other debenture-holders. They further say that the amount borrowed has been repaid except to the extent of 500*l.*; that the creation of any further charge upon the debentures would be a borrowing in excess of the nominal amount of the debentures, and therefore would be the creation or issue of, or an attempt to create, a charge ranking *pari passu* with the other debentures.

That point seems to me to be really independent of *In re W. Tasker & Sons, Ltd.* (1), which has been relied upon. I think, the point being as I have stated it, the conclusion of law results. If once you issue debentures, and the amount nominally secured by the debentures is advanced on that security, you cannot create a charge for any further sum without creating an additional charge which purports to rank *pari passu* with the debentures of the original issue. That is exactly what has taken place here. It seems to me there is no peculiarity in the fact which is asserted, although it is not expressed in the affidavits, that the debentures were issued to secure a current account. It seems to me that, even in the case of a current account when the full amount has been borrowed, and when the account has been in debit to the full sum of the nominal value of the debentures, then, if the debit has been paid off, any attempt to borrow further money on the security of the debentures is really to issue a fresh security.

The plaintiffs, I think, would be entitled to succeed on that, but they take another point. It is another point in form, although it is substantially the same point. They say that these debentures

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are now held as security for 500*l.* only, and they meet the suggestion that the security might be transferred to somebody who might advance more than the 500*l.* by saying that if that took place, or even if the bankers advanced a further sum than the 500*l.*, it would come to exactly the same thing as if the debentures had actually been redeemed for the 500*l.* What they say is, "We are entitled to say that the debentures shall be held subject to redemption on payment of that sum which is owing now." If they are to be redeemed by any transaction taking place either between the present creditors of the company alone, or between the present creditors and the transferee and the company, the transferee can only get an additional charge by virtue of the act of the company, and that act of the company amounts to the creation of a charge *pari passu* with the debentures.

I think that point also ought to be decided in favour of the plaintiffs, and I think, therefore, the plaintiffs are entitled to the injunction for which they ask, which is to restrain the company from creating, by issue of or charge upon any of these debentures which are specifically mentioned, any charge on the property comprised in the trust deed ranking *pari passu* with the remainder of the debentures thereby secured, or applying to the redemption of the debentures any sum in excess of the amount now secured upon them.

The order as drawn up was as follows:—

"This Court doth order that the defendant company be restrained until judgment or further order from creating by an issue of or a charge upon any of the 763 debentures of the defendant company, the numbers whereof are set out and described in the indorsement of the said writ, any charge upon the property comprised in the indenture mentioned in the indorsement of the said writ purporting to rank, with regard to such property, *pari passu* with the remainder of the debentures thereby secured, and from applying to the redemption of the said debentures, or any of them, any sum in excess of the amount now secured thereon out of the amounts which ought under condition 7 of the debentures to be applied in redemption of the debentures of the said issue."

W. I. C.

C. A. The defendant company appealed. The appeal came on for hearing on July 29, 1907.

*II. Terrell, K.C., J. Eldon Bankes, K.C., and J. F. Carr*, for the appellants. The company ought not to be restrained from borrowing further sums on the security of the 763 debentures. We had power under clause 3, sub-clause (N), of the memorandum of association, and article 85, sub-clause (F), to create and issue these debentures; to charge them with as much as we liked; and, therefore, to make these arrangements with Messrs. Brown, Shipley & Co. These provisions are in the widest possible terms, and such transactions are common in business circles.

[SIR GORELL BARNES, PRESIDENT. I doubt whether the advance of 500*l.* was authorized by the memorandum and articles.]

The plaintiffs admit that the issue of the debentures was authorized. The 1000 debentures in question were originally issued as collateral security to secure the 150,000*l.*, so there were two debts—viz., first, the 100,000*l.* due on the debentures; and, secondly, the debt secured by the deposit of the debentures. On the first debt Messrs. Brown, Shipley & Co. could have proved for the whole 100,000*l.*: *In re Regent's Canal Ironworks Co.* (1); although they could not have retained more than was actually due on the security. The debt created by the credit would fluctuate from time to time. We admit that if either of the debts had been paid off and the debentures had been handed back to the company they would have been dead, and could not have been re-issued. But that has not been done, and as long as any debt is due the whole 100,000*l.* is due on the first debt. The amount of the second debt can be varied without affecting the first debt. Warrington J. relied on *In re W. Tasker & Sons, Ltd.* (2), but in that case the whole of the debt secured by the deposit of the debentures had been paid off and the debentures had been given back to the company. In the present case before the original credit was paid off a new credit was created on the same security. In principle this credit was exactly like a current account; for every item in a current account is in law a fresh transaction, but the other debenture-holders have no right to interfere in such matters. The agreement between them and the company was that the series of debentures should not be increased; and it has not been increased. We do not dispute

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that the other debenture-holders are entitled to have their security improved by the death of the deposited debentures, but they must make out a case for it. We are doing nothing to increase the liability beyond the original 500,000*l.* The credit is not the debenture debt, and does not rank *pari passu* with the other debentures.

[COZENS-HARDY M.R. If this were a current account there would be great force in your argument, but it is not.]

These 763 debentures are still alive. Neither of the two debts (the debenture debt and the credit) has been paid off. In *In re W. Tasker & Sons, Ltd.* (1) the Court held that the debentures were dead because the charge was extinguished; and by "charge" they meant the debenture debt.

[COZENS-HARDY M.R. We were referring to the loan, not to the debenture debt. The fact that the debentures had been actually handed over to the company was of no consequence. The company in this case could have recovered them whenever they liked.]

It has never been decided that if debentures are once pledged to secure a certain amount they cannot be afterwards pledged to secure a different amount. We submit that as long as debentures are outstanding they can be pledged as collateral security for any amount. Otherwise debentures for 100,000*l.*, if once pledged to secure 10*l.*, could never be used again. By the terms of the trust deed these debentures were floating securities, and were not to prevent the company from making mortgages in the ordinary course of its business. So it is clear that such transactions as these were contemplated. It is a mistake to speak of these credit operations as loans. Messrs. Brown, Shipley & Co. did not actually lend any money. They took this security in order to protect themselves in the event of the company not meeting the bills. The condition on which the security became available did not happen, so it cannot be said that the loans were paid off. In *In re W. Tasker & Sons, Ltd.* (1) there was a loan, and it was held that inasmuch as the obligation was discharged the debentures were spent: but there is no intermediate position; if the obligation is not discharged the debentures are not spent—they are not

kept alive pro tanto. Here it was admitted in the Court below that 500*l.* was due on the security.

[*Rowden, K.C.* We do not admit it now that this further evidence has been adduced.]

The obligation was kept alive by means which the parties were entitled to use, viz., by an advance of 500*l.*

*Rowden, K.C.*, and *A. R. Kirby*, for the respondents, were not called upon.

COZENS-HARDY M.R. In my view this appeal is governed by the case of *In re W. Tasker & Sons, Ltd.* (1), and, as I was a party to that decision, I will ask the President of the Probate Division to give judgment in this case.

SIR GORELL BARNES, PRESIDENT, stated the facts, and continued—The effect of the transaction was that the debentures which are in question now were cleared off to the full amount for which they had been security, unless it can be said that the 500*l.*, which was advanced in the way stated by the further affidavit, was still to be treated as secured by them. The company proposed to treat those debentures as still existing for the purpose of obtaining fresh loans and a fresh credit upon them. The other debenture-holders, represented by the plaintiffs, have moved to restrain the company from acting in a manner which would give a fresh charge on these debentures, or treating them as issued for the purpose of securing further loans. That has at present been restrained by Warrington J., and from his judgment this appeal is brought.

I agree with the view, which has been very shortly indicated by the Master of the Rolls, that this case is substantially covered by the decision in *In re W. Tasker & Sons, Ltd.* (1) Warrington J. in his judgment has put the matter very shortly in these words. He says this: “The plaintiffs raise two points. They say, first, that the whole amount has been borrowed on the security of these debentures, and that, that having been done, no more can be borrowed on that security as against the other debenture-holders. They further say that the amount borrowed has been

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repaid except to the extent of 500*l.*” I ought to point out here that the 500*l.* is not a part of the original loan. The further affidavit shews that the original loan was entirely paid off, and that the 500*l.* was a fresh advance. The appellants say that that is secured by these debentures, and the other debenture-holders dispute that contention. Then the learned judge proceeds as follows: “The creation of any further charge upon the debentures would be a borrowing in excess of the nominal amount of the debentures, and therefore would be the creation or issue of, or an attempt to create, a charge ranking *pari passu* with the other debentures. That point seems to me to be really independent of *In re W. Tasker & Sons, Ltd.* (1), which has been relied upon. I think, the point being as I have stated it, the conclusion of law results.” Then follows the most important part of his judgment: “If once you issue debentures, and the amount nominally secured by the debentures is advanced on that security, you cannot create a charge for any further sum without creating an additional charge which purports to rank *pari passu* with the debentures of the original issue. That is exactly what has taken place here. It seems to me there is no peculiarity in the fact which is asserted, although it is not expressed in the affidavits, that the debentures were issued to secure a current account. It seems to me that, even in the case of a current account when the full amount has been borrowed, and when the account has been in debit to the full sum of the nominal value of the debentures, then, if the debit has been paid off, any attempt to borrow further money on the security of the debentures is really to issue a fresh security.”

It is unnecessary to proceed to the second point, which the learned judge treats as substantially the same as the first; and it is unnecessary in my opinion to express any view as to what would be the position if this were a security for a current account. The earlier part of the passage which I said was important is that which I think ought to be affirmed in this case.

The reason why it seems to me that this case may be treated as covered by *In re W. Tasker & Sons, Ltd.* (1) is mainly what was said by the present Master of the Rolls in the course of that

(1) [1905] 2 Ch. 587.

judgment. There are two short passages to which I propose to refer. He says this (1): "As at present advised, I think a company cannot under such circumstances re-issue. The re-issue is in substance the creation of a fresh charge. The extinguishment of the old charge must enure to the benefit of the persons entitled to *pari passu* charges: *Frazer v. Jones*. (2) But it suffices in the present case to say that the company did not profess to re-issue, and that the appellants must succeed or fail as transferees of issued debentures." Again, there is this passage (3): "It seems to me that the redemption of the debentures by payment off of the loans must involve precisely the same consequences as if the debentures had been redeemed by payment off of the amount due on the debentures themselves. In either case the debentures were spent; nothing was due under or in respect of them." The position is substantially the same in this case as was indicated by the judgment in those two passages. These 100,000*l.* of debentures were issued and deposited for the purpose of securing loans which exceeded the nominal amount of the debentures. It is true the bills were renewed from time to time, but the ultimate position was that, allowing for certain redemptions by drawings, the whole of the debentures were paid off unless it can be said that the 500*l.* to which I have referred already was advanced upon their security. To my mind that cannot be done. The effect was to pay off the whole amount for which the debentures were originally security, and, that having been done, it seems to me the debentures are just as much dead in this case as if they had been actually handed back to the company.

I desire to add, however, one further point which I think is not unworthy of consideration, though it has not been really discussed at any length. The appellants assumed that there was a power to re-charge these debentures with this sum of 500*l.* I go so far as this, that I entertain the very greatest possible doubt whether there was that power, and the reason I say that is this: According to the debentures they were issued under the authority of clause 3 (N) of the memorandum and article 85 (F)

(1) [1905] 2 Ch. 601.

(2) (1846) 5 Hare, 475, 481.

(3) [1905] 2 Ch. 602.

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—

of the articles of association. Article 85 (F) is in these terms :  
The board have power to “ borrow or raise any sum or sums of money on such security, and upon such terms as to interest or otherwise, as they may deem fit, and for the purpose of securing the same and interest, or for any other purpose, create, issue, make and give respectively any perpetual or redeemable debentures or debenture stock or any mortgage or charge on the undertaking or the whole or any part of the property present or future, or uncalled capital of the company, and any debentures, debenture stock and other securities may be made assignable free from any equities between the company and the person to whom the same may be issued.” Then there is a proviso which is not material to the point I am mentioning. That clause, I think, is limited to the power to raise money and for that purpose to create, issue, make and give debentures. In this case that power was exhausted by the borrowing of the money to the full amount and the issuing of the debentures for that amount up to the extent of 100,000*l.* It may be that there is ample power to create fresh debentures for the purpose of securing the 500*l.* or further advances, but I cannot myself see—and I express the very greatest doubt about it—any right to re-charge these debentures with a fresh loan when the whole object of the issue was to secure a loan to the full amount for which those debentures were originally issued. For these reasons it seems to me that this order of Warrington J. was right, and that the appeal ought to be dismissed.

KENNEDY L.J. I am of the same opinion ; but I think that, while affirming the decision of the learned judge, we should revise the order unfavourably to the present appellants, because by the terms of the order the learned judge has treated the debentures as being a security for 500*l.*, stated to be “ the amount now secured thereon.” Now that we have the explanation of what took place, as appears by paragraph 18 of the further affidavit, the truth is that the 500*l.* ought not to be treated as secured, and therefore the order will be varied in favour of the respondents to the appeal to that extent. We now know in detail the true history in the affidavit which, since the opening

of this appeal, has been placed before the Court. The learned judge below had not the advantage of that knowledge. We now have the full facts, and it is quite clear that in substance, whatever be the business title of the relationship between the parties, it has really and in effect been the giving of security by the company, in consideration of that which I will call a credit or a continuing pecuniary assistance—that which was equivalent to a loan, although not precisely at any one moment an actual loan in the strictest sense of that term. The company deposited these debentures originally, and continued to keep them, with Messrs. Brown, Shipley & Co., in consideration of pecuniary assistance through a series of bill transactions which were only closed at the time and in the manner described in the 18th paragraph of the further affidavit. The transaction is described by Warrington J. as an amount borrowed. He had not then, as I have said, all the details we have now before us, and therefore no sort of argument can be founded on the suggestion that there has been a mistake, because it was not a loan. In effect it was a loan because it was pecuniary assistance, but technically, perhaps, it was not a loan, although the learned judge might very well think so from the evidence which was placed before him. But, whatever it was, that liability to them for which Messrs. Brown, Shipley & Co. originally obtained and became entitled to retain, and in certain events might have been entitled to realize, these debentures, has been now satisfied as between the company and themselves. The debentures have, in fact, been paid off by the discharge of that pecuniary indebtedness which arose through the transaction, which, whatever you call it, was not a current account, and was in substance, although not precisely in form, a loan. It seems to me that I cannot, after the careful arguments we have heard, distinguish the nature of the transaction and the legal relations to which it gives rise from those which were the subject of consideration in *In re W. Tasker & Sons, Ltd.* (1), and I think that when the present Master of the Rolls says, “It seems to me that the redemption of the debentures by payment off of the loans must involve precisely the same consequences as if the debentures had been redeemed by payment off of the amount

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due on the debentures themselves," he is using language which, with the one qualification that this might perhaps strictly not be called a loan, but was pecuniary consideration given, exactly covers the present case.

In my opinion this appeal fails, and in substance the judgment of the learned judge below is in every respect correct. In that judgment an opinion is expressed that "even in the case of a current account when the full amount has been borrowed, and when the account has been in debit to the full sum of the nominal value of the debentures, then, if the debit has been paid off, any attempt to borrow further money on the security of the debentures is really to issue a fresh security." It seems to me, speaking for myself, that it is not necessary to decide this point, although I am far from saying that, if it were investigated, the opinion expressed by the learned judge would not be found to be correct.

COZENS-HARDY M.R. I think a slight alteration ought to be made in the order by omitting the words "in excess of the amount now secured thereon," because on the materials before the learned judge he thought, and he was justified in thinking, that there was 500*l.* due.

Solicitors : *Ashurst, Morris, Crisp & Co. ; Nicholson, Graham, & Beesly.*

H. C. R.

*In re W.*

W. v. M. (1)

[1903 W. 2256]

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KEKEWICH  
J.

July 25, 30.

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Oct. 15.

*Infant—Ward of Court—Guardian—Religious Education—Welfare of the  
Infant—Religion of Father—Change of Religious Education—Discretion  
of Court—Form of Order as to Education.*

By an order of April, 1904, the son and daughter of a Jewish father, then aged respectively ten and eight years, were directed to be brought up in their father's religion, and, both parents being dead, were placed in a Jewish household for this purpose. In March, 1907, the boy wrote to his guardian that he no longer wished to be educated as a Jew. This letter was sent to the judge, who, after interviews with the boy and further inquiries, came to the conclusion that the welfare of the boy demanded his sanction to a change in his religious education, and he accordingly made an order that both infants should be henceforth brought up in the Christian religion:—

*Held* (affirming Kekewich J. on this point), that it would be morally injurious to the welfare of the boy not to give effect to his wishes, but as there was no evidence to justify any order changing the religious education of the girl, this portion of the order must be varied.

In all orders relating to the religious education of a ward of Court the words "until further order" must, from the nature of the case, be deemed to be inserted.

THIS was an appeal from an order of Kekewich J. directing the two infant plaintiffs, a boy aged thirteen and a girl aged eleven, wards of Court, to be brought up in the Christian religion notwithstanding a former order of April, 1904, by which he had directed the infants to be brought up in the Jewish faith. The material facts were as follows:—

The father of the infants, who was born a Jew, and was generally known throughout his life as of the Jewish persuasion, married in May, 1893, a lady who was not of the Jewish persuasion, the marriage taking place at a registry office in the City of London.

(1) This case was heard *in camera*, and is reported by leave of the Court of Appeal and of Kekewich J.

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In May, 1894, the boy plaintiff was born, and was circumcised on the eighth day.

In July, 1896, the girl plaintiff was born.

In January, 1902, the father died, having by his will left his property, which was considerable, to his wife for life, and then to his two children, and having appointed his wife and the defendant M. executrix and executor and trustees of his will.

In June, 1903, the infants' mother died, having by her will appointed the defendant M. to be the guardian of the infants. M. was not of the Jewish persuasion.

The above action was shortly afterwards instituted on behalf of the infants by their paternal uncle as next friend, to which M. was made a defendant, for the administration of the estate of their deceased father, and the usual accounts and inquiries had been directed.

Application having been made in due course to the judge in chambers as to the maintenance and religious education of the infants, Kekewich J., after a considerable amount of evidence on both sides, came to the conclusion, in a written judgment of April 14, 1904, that the infants' father ought to be regarded as a Jew, and that the infants ought to be brought up in their father's faith and placed in a Jewish household. This judgment was embodied in an order of April 18, 1904.

It appeared from the evidence that no definite religious instruction had been given to the infants during the life-time of their parents, except that the boy, with the knowledge and approval of his father, had been instructed by a confidential clerk in the New Testament as well as in the Old.

The judgment of April, 1904, was carried into effect by the infants being sent to an assistant master at Cheltenham School, himself a Jew, and who kept a boarding-house for Jewish children. The children were duly instructed in the Jewish religion, and the boy was in March, 1907, in course of being prepared for the Jewish confirmation. In March, 1907, the defendant M. received a letter from the boy stating that he did not wish to be brought up as a Jew, and asking the defendant M. if he could take any steps in the matter. This letter was sent on to Kekewich J., who saw the boy himself and directed the

official solicitor to make inquiries. The result of these interviews and inquiries is stated at length in the judgment of Kekewich J.

The present summons was taken out by the official solicitor by the direction of the judge to obtain the direction of the Court under the existing circumstances as to the religious education of the infant plaintiffs. The summons came on for hearing before Kekewich J. on July 25, 1907.

*T. T. Methold*, for the official solicitor.

*Jessel, K.C.*, and *H. S. Q. Henriques*, for the next friend of the infant.

*Stewart-Smith, K.C.*, and *Stokes*, for the defendant M., the guardian.

*Cur. adv. vult.*

July 30. KEKEWICH J. delivered the following written judgment:—In coming to a conclusion in this extremely difficult case, which I will first treat as affecting the boy only, I have to bear in mind and give due proportionate weight to—(1.) my own order of April, 1904, directing the boy to be brought up in the Jewish faith; (2.) the wishes of the father; (3.) the welfare of the child. All the circumstances have to be considered and set one against the other, but there is no point of importance not falling under one of these three heads.

As regards my own order of April, 1904, I believe it to have been right. It was made after careful consideration of all the materials then available, and with the best possible assistance of counsel on either side, and there is not much, though there is some, addition now to the knowledge of the facts to that date then possessed. No change ought to be made without grave conviction that it is right; but if convinced that a change is right, I ought not to hesitate to make it because it is inconsistent with my own earlier order, or even with my own views as then expressed. No more need be said about that. The father's wishes certainly deserve most serious consideration. They received it before, and they must receive it again now, but when it is said that I must treat the case as if the father were still alive, and that I must ask myself what the father would say if

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told all that has since occurred, I am confronted with the insuperable difficulty of being unable to conceive how the question would present itself to his mind. Would he say, "If the boy being now thirteen desires to be brought up as a Christian, let him have his own way." I entertain great doubt whether that would be his view. Would he rather say, "Let the boy alone for a time, and when he is a little older let him decide for himself, and if then he determines to desert the Jewish faith, I shall offer no objection." That is more possible, but cannot be regarded as by any means certain. I recognize, of course, to the fullest effect the paramount authority of the father's wishes, and I will put aside, not as unimportant, but as in this particular case of comparatively little weight, the wishes of the surviving mother. But the Court has always admitted that the welfare of the child is the real ultimate object of its care, and I do not think that any case can be cited to shew that obedience to the father's wishes ought to obtain against that welfare. Therefore, while bearing in mind and giving great weight to the wishes of the father, I pass to the third head with the conviction that if I find a particular course distinctly for the benefit of the boy I ought to adopt it even though I think, where assurance is possible, that the father would probably not have sanctioned it. I have no doubt from the evidence, and from what the boy told me himself, that he desires to be brought up as a Christian. Ought I to give way to that desire standing alone and regarded apart from other considerations? I think not. He is an intelligent boy with a reflective mind which has obviously dwelt more on the subject of religion than is usual with boys of his age, but it would be wholly adverse to my observation and experience to believe that he has maturely considered the distinctions between the Jewish and Christian faiths and has arrived at a permanent conclusion. Nevertheless, it is clear that his mind has reverted to his early Christian teaching, and that he entertains a repugnance to the faith in which he has been brought up during the last few years. It is difficult to ascertain to what causes that repugnance ought to be attributed, but I am satisfied that it exists, and I am not satisfied that it could be removed by adopting the suggestions of his uncles, that the Jewish surroundings of his school time

should be strengthened by bringing his holidays more into harmony with them. On the other hand, I know enough of human nature, or shall I say boy nature, to be aware that nothing produces such strong and lasting effects on conduct as compulsory obedience to commands which are not accepted as just or right, and the ultimate revolt against such commands is not the less decisive because necessarily postponed. That holds good in all departments of life, and is equally true as regards boys and adults. This is a good boy, and if the order goes that he is still to be brought up in the Jewish faith, I have no doubt that he will obey it loyally; but I also have no doubt that for a time at least there would rankle in his mind the thought that he is being compelled to do what is repugnant to him, and there is at least great danger of the thought producing permanent effects. For these reasons I am unwilling to draw the reins tighter and to insist on the stricter Jewish education which is urged by Mr. Jessel with good reason to be necessary to make the boy more attached, and maintain him attached, to the Jewish faith. I believe that the methods proposed to be adopted to that end would tend to divorce him from the conclusion to which they are intended to be directed.

One escape from this difficulty is obvious and tempting. I might allow things to remain as at present, indefinitely postponing the confirmation, about which a word presently, and which I understand can be postponed without offence to the rules and practice of the Jewish Church. He would then continue his education in the Jewish faith, and among Jewish surroundings so far as they can be secured according to the existing arrangements, and such other arrangements as will have to be made when the time comes for the move from Cheltenham, but he would be given the opportunity of reflecting for himself and arriving gradually with more decision and with a more mature mind at a conclusion of his own respecting his religious opinions. It is likely, according to the evidence, that this would accord with his father's wishes, and it has the advantage of casting on the boy himself, at a proper time, the entire responsibility of decision on the most important of all subjects, instead of the Court endeavouring to force one on him. I dare not do this. I know that many at

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least as qualified as myself to form an opinion, and for whose opinion I entertain deep respect, think differently, and I know, too, that by bringing up a child strictly in the tenets of any faith you are apt to make him a bigot or prepare the way for utter infidelity when an inquisitive mind will no longer be restrained. Nevertheless, my own conviction, that the scriptural injunction to train up a child in the way in which he should go applies to the highest as well as to the lower stages of education, is so strong that it is impossible for me to disregard it. To me there is no middle course, and the boy must be brought up either as a Jew or as a Christian.

It is right that I should here state what led to the present application being made. Some time ago the guardian brought me a letter from the boy to himself, in which the boy requested to know my opinion whether he must be confirmed according to the rites of the Jewish Church. Confirmation does not seem to be so important as on first inquiry I thought it was, but at least it would be a public admission by the boy that he is, and intends to remain, a Jew. It is, therefore, a step which ought not to be taken if there is any doubt about that fact. In his letter the boy expressed a dislike to the daily work in preparation for confirmation, which interfered with his ordinary studies, but he added that he wished it put off until he could decide for himself. After reflecting on this letter, I sent for the boy and had some conversation with him. He is just thirteen, he has done well at school, and his intelligence is fully equal to the average of boys of his age. I was extremely careful not to press him, but he readily gave the information which my questions were directed to obtain. The evidence on the former occasion disclosed the fact that his early education had been left in great measure to a clerk of his father's, who was a Christian, and had imparted some religious teaching, including knowledge of the Old and New Testaments. Perhaps I did not attach sufficient importance to this at the time. I should have attached more if the information had been conveyed as it was conveyed to me by the boy. The clerk's teaching had evidently sunk deep. I ventured to ask him, very tenderly, about his private prayers, and he told me that he did not use the name of Christ, but he did daily say

the Lord's Prayer. There is not a word in that prayer which, standing alone, need offend a Jew, but yet I suppose it could not be properly used by any one not having faith in the author of it. He assured me that he had not been chaffed for being a Jew, and had neither in this nor any other way been influenced by others. In answer to inquiries about his daily habits, I found that he regarded the observance of the Jewish Sabbath as rather a waste of time, because it took him from his school studies, which nevertheless he was not allowed to pursue on Sunday. This is of little importance in itself, but it indicates the trend of his reflections. After this interview I saw the guardian, and told him that he was in no way to press the boy, but that during the then coming holidays he and his wife ought to take note of any indications of his views which might be of assistance to me, and the result is given in the guardian's affidavit. I did not think it right that he should take any step indicating a view in the question which I saw must be submitted to me, and I therefore requested the official solicitor to issue the summons under consideration.

I cannot doubt that the boy is longing to be brought up as a Christian, and that this longing is not a mere whim, but is as deep and of as permanent a character as can reasonably be expected of any reflective child of his age. With a keen sense of the responsibility cast on me, and shrinking from a danger which cannot be over-estimated, I have, after anxious reflection, come to the conclusion that the welfare of the boy demands my sanction to the change, and I have no right to avoid a step which, however momentous, I think it my duty to take. This is not the occasion for determining how that should be done. There are many details which will require careful consideration, and they must be considered with the guardian, who is, I know, alive to all the difficulties of the situation and anxious to do his best.

Hitherto I have not said a word about the girl. She is two years younger than the boy, and, though I believe an intelligent child, not equal in that respect to her brother. They have been brought up together and are much attached to each other, and not only would it be cruel to part them, but natural affection would be sure to make it in the end practically impossible to

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C. A. bring them up in different faiths. I have not seen the girl,  
 1907 because I thought it out of place to discuss matters of religion  
 W., with a child of that age. But what I have said above is enough  
*In re.* to satisfy me that she also must be taken from Jewish surround-  
 W. ings and brought up in the Christian faith. As regards her as  
 c. well as the boy, great circumspection will be required, but again  
 M. that is not a matter for present consideration.

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The order as drawn up directed that "the said infant plaintiffs be henceforth brought up in the Christian religion."

C. A. From this order the next friend of the infants appealed. The appeal was heard on October 15, 1907.

*Jessel, K.C.*, and *H. S. Q. Henriques*, for the appellant. No case has been or can be cited in which the Court has made an order for the education of an infant in one religion and then altered its mind and ordered him to be educated in another and quite different religion. No special circumstances have arisen, and no special cause is shewn, why the order directing these infants to be brought up in the religion of their father should be varied. The boy is much too young to have any settled convictions, and there is no evidence that he has; he is too young to be allowed to change his religion and become the master of his own destiny in this way, and also of the destiny of his sister, from whom he cannot be separated. A change of religion on the part of the boy involves a change of religion on the part of the girl.

The deliberate order of the Court made in 1904, which orders the children to be brought up in the father's religion, must not be disregarded at the instance of a child of this age. The infant is invariably brought up in the religion of the father, and the order of April, 1904, has followed this rule. The Court is in loco parentis, and directs the children to be brought up in the father's faith.

[FARWELL L.J. In *Stourton v. Stourton* (1) Turner L.J. lays it down that the "well-being of the infant" is the guiding consideration in all these cases, and he says, "if the wishes of

(1) (1857) 8 D. M. & G. 760, 771.

the father cannot be carried into effect without sacrificing what the Court, acting without bias, judges to be for the well-being of the children, those wishes cannot be attended to.”]

It cannot be to the interest of the children to change their religion and become dissociated from their only relations, who are Jewish; it cannot be for the welfare of the boy to separate him from his sister. Accepting the law that the “welfare of the infant” is the paramount consideration, still no case can be cited where the Court has allowed a child to change his religion at so early an age as thirteen. No father would permit such a change at this age.

In *Stourton v. Stourton* (1) there was a settled conviction on the part of the child; that is not the case here. No direction, therefore, ought to be given, as in *In re McGrath*. (2) In *Hawksworth v. Hawksworth* (3), where *Stourton v. Stourton* (1) is commented on, the child was ordered to be brought up in its father’s faith, though the mother was bringing it up in another. In *Davis v. Davis* (4) the Court declined, at the instance of the child and his mother, to have him educated in any other faith than the father’s. In *In re Newbery* (5) the wishes of the children were not attended to. [*Skinner v. Orde* (6) and *Andrews v. Salt* (7) were also cited.]

There is no evidence that the father at any time abandoned his right to have his children brought up in his own faith; and there is nothing to shew that this proposed change of religion will be for the welfare of the infants. There is no justification for ordering the religion of the girl to be changed. She has made no application for this, and she has not been interviewed by the learned judge.

*Stewart-Smith, K.C.*, and *Stokes*, for the guardian, were only called upon with reference to the proposed change in the religious education of the girl. The guardian takes no side in this dispute, but he is bound to point out that the children are much attached to one another, and to bring them up in

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(1) 8 D. M. &amp; G. 760, 771.

(2) [1893] 1 Ch. 143.

(3) (1871) L. R. 6 Ch. 539.

(4) (1862) 10 W. R. 245.

(5) (1865) L. R. 1 Eq. 431.

(6) (1871) L. R. 4 P. C. 60.

(7) (1873) L. R. 8 Ch. 622.

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different religions may cause a serious difference between them hereafter.

*T. T. Methold*, for the official solicitor, took no part in the argument.

COZENS-HARDY M.R. This is an appeal from the decision of a judge who has had very great experience in connection with wards, and of whom I may perhaps venture to say that there is no judge on the bench who exercises greater care and more conscientious diligence in endeavouring to do what is right in administering the delicate and difficult jurisdiction of the Court over wards. In a case in which the learned judge has himself twice seen one of his wards, and has sent down the official solicitor to have an interview and to make a report to him, I should be extremely reluctant to interfere with the discretion he has exercised.

So much for the general principle in this case; but as we have had a good deal of argument addressed to us on the legal aspect, I do not think it would be a waste of time to read one passage from the judgment of Turner L.J. in *Stourton v. Stourton* (1), and another passage from the judgment of Lindley L.J. in *In re McGrath* (2), as stating what in my view is now the settled doctrine of the Court in cases of this kind. Turner L.J. in *Stourton v. Stourton* (1) says: "When infants become wards of the Court the first and paramount duty of the Court unquestionably is to consult the well-being of the infants, and in discharging that duty the Court recognizes no religious distinctions. If, consistently with the due discharge of that duty, the wishes of the father can be attended to, the Court, having regard, as I apprehend, to the power with which the law of the country has entrusted the father of appointing guardians for his children, and thereby directing and regulating their future course of life, pays attention to those wishes; but if the wishes of the father cannot be carried into effect without sacrificing what the Court, acting without bias, judges to be for the well-being of the children, those wishes cannot be attended to." In the case of *In re McGrath* (2) Lindley L.J., in giving the

(1) 8 D. M. & G. 760, 771,

(2) [1893] 1 Ch. 143, 148.

considered judgment of the Court, says this: "The dominant matter for the consideration of the Court is the welfare of the child. But the welfare of a child is not to be measured by money only, nor by physical comfort only. The word welfare must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-being." The law does not impose on the Court a duty of doing more than to order a child to be brought up in its father's religion, unless there are sufficient reasons for doing otherwise.

Now, applying these principles to the present case, it remains for me to state shortly the following facts. The father was a Jew by religion. The mother was not a Jew. Neither father nor mother can be regarded as being very strongly or definitely Jews in their observances. Upon the uncontradicted evidence no religious instruction was given to either of the two children, except, in the case of the elder child, by a confidential clerk, who with the knowledge of the father, and upon the evidence with his approval and by his direction, instructed the boy in the New Testament as well as in the Old. The father died leaving a considerable fortune; the mother is also dead. There are apparently no near relations, if any relations at all, on the mother's side. The relations on the father's side are members of the Jewish faith, and the present appellant is an uncle who desires that both children should continue to be brought up and educated as Jews.

This matter was discussed before Kekewich J. as long ago as April, 1904, soon after the death of the mother. At that time the learned judge held, upon the evidence which was brought before him, that there was sufficient to justify him in holding that the general rule that the father's religion ought to be the guide should be followed, and he held and declared that these infants ought to be brought up in the Jewish religion. Effect was given to that order by the guardian, who, so far as I can gather, has discharged his delicate duties as guardian with the approval of the Court and in a manner which all just men must admire. They were sent, under the sanction of the Court, to an assistant master at Cheltenham School, himself a Jew, who keeps a boarding-house for Jewish boys, and who on the

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Sabbath gives instruction in the Jewish faith to his boarders. I see no reason to doubt that, on the materials which were then before Kekewich J., that was an order which was proper to be made. But after a lapse of three years, when the boy was thirteen and the girl eleven, the boy wrote a letter from this boarding-house to his guardian, who with great propriety forwarded it to the learned judge. We have not, unfortunately, been able to see the actual letter itself; but the letter made an impression upon the mind of the learned judge, who, either immediately after that letter or shortly after, saw the boy himself, and sent down the official solicitor to see him and to make inquiries on the spot. The result of that interview, and of the information which the official solicitor gave to the learned judge, was that the learned judge directed the official solicitor, as next friend pro hac vice, to issue a summons to raise the question whether these children ought still to be brought up as Jews or not. We have not this letter, and of course we have not what ought to be excluded or never permitted in a case of children of this age, namely, any affidavit by the boy; but we have that which is infinitely more valuable, and as to which, speaking for myself, I attach the greatest possible importance. We have the impression produced upon the mind of this very experienced and very careful judge by the actual personal interviews which he had with the boy. I think I ought to read what the learned judge says with reference to this. [His Lordship having read that portion of the judgment of Kekewich J., continued :—]

I cannot hesitate to say that I think the learned judge was perfectly right in coming to the conclusion that the welfare of the boy demanded his sanction to the change in religious education after satisfying himself that the longing to be brought up as a Christian was not a mere whim, nor a mere fancy, but was as deep and of as permanent a character as could reasonably be expected, and in my opinion it would be very wrong, and it would be morally injurious to the welfare of the boy, not to allow effect to be given to that wish, but to insist upon forcing a boy of that age, under these circumstances, still to be brought up in a faith towards which he has now a repugnance. I therefore think that it is impossible for us to differ from the views which

the learned judge, after those two interviews, and after all that has taken place, has arrived at, and I am of opinion that the appeal must fail so far as the boy is concerned.

Now with reference to the girl, the case seems to me to be essentially different. The learned judge deals with that very shortly at the end of his judgment. He has not had an interview with the girl; if I may say so, quite properly, he has not thought it right to see her because of her tender years. There is not a particle of evidence in her case to justify any change from the circumstances which existed at the time when the learned judge thought and decided that this infant should be brought up in the Jewish religion. I am conscious of the disadvantage which always exists when a brother and sister are brought up in different faiths, but common experience teaches us that it is by no means unusual for boys to be brought up in one religion and girls to be brought up in another. One knows that this was a common stipulation in marriage contracts between Protestants and Catholics. As the time must come shortly when the girl will be necessarily separated from her brother, and when she will go to one school and he will go to another, I see no serious disadvantage in separation. I see nothing to justify our now departing from the former order as to the education of the girl; because the education of these infants must, in the natural course of things, be separate hereafter, and I am quite sure that the learned judge will take good care that wherever the brother and sister may be educated they shall spend their holidays together, so that, I trust, the harmonious and happy relations which ought to exist between brother and sister may be in no way disturbed by the boy being sent to a school different from that at which he now is, and a school where he will be taught the Christian religion.

Under these circumstances I think we must allow the appeal so far only as relates to the girl. I only wish to add this: that although we do not interfere with the former order, which directs the infant plaintiffs to be henceforth brought up in the Jewish religion, and though I do not think it right or necessary to insert in the order that the son is to be brought up in the Christian religion "until further order," and the daughter to be

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brought up in the Jewish religion "until further order," I wish it to be clearly understood that in the case of any order dealing with a ward of Court in regard to the religion in which such ward is to be brought up, the words "until further order" must, from the nature of the case, be deemed to be inserted, because the Court can never contemplate making an order in the case of infants of tender years, which is to bind them until they are twenty-one, notwithstanding any change of conviction or change of feeling on their part.

For these reasons I think, with the greatest possible respect to the learned judge, that his order must be varied with reference to the daughter, and with reference to the daughter alone. The matter has been brought before us quite properly, and in a case of this kind the costs must come out of the estate.

FLETCHER MOULTON L.J. I am of the same opinion.

FARWELL L.J. I agree.

Solicitors : *Adler & Perowne ; Marsden & Son.*

W. C. D.

## SHEPHEARD v. BRAY.

[1904 S. 2354.]

C. A.\*

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Oct. 21.

*Company—Prospectus—Untrue Statement—Action by Shareholder against some of the Directors—Compensation paid by Defendants—Contributions from Co-directors—Evidence—Liability of Estate of deceased Director—Costs—Directors Liability Act, 1890 (53 & 54 Vict. c. 64), ss. 3, 5.*

THIS was an appeal from a decision of Warrington J. (1)

After the appellants' (the defendants) case had been fully argued, and the case for the respondents partly heard, counsel for the respondents informed the Court that a settlement had been arrived at on the following terms:—

“Appeal allowed. Order below to be reversed and action dismissed. No costs here or in the action; plaintiffs to make no claims for contributions in the future against the representatives of either Bray or Gaunt in matters arising out of the prospectus issued by the Northern Bank, Limited, referred to in the pleadings in the action.”

*Danckwerts, K.C.*, and *Kirby*, for Bray's executors.

*Gore-Browne, K.C.*, and *Hon. F. Russell*, for Gaunt's executors.

*Astbury, K.C.*, *Felix Cassel, K.C.*, and *W. H. Cozens-Hardy*, for the plaintiffs.

COZENS-HARDY M.R., after directing the order to be drawn up in the terms agreed, continued:—Although we have not been called upon to give judgment in this case, it must not be assumed that the members of the Court, as at present advised, having heard the arguments of the appellants and a good deal of the respondents in reply, are prepared to assent to all that Warrington J. has decided.

FLETCHER MOULTON and FARWELL L.JJ. concurred.

Solicitors: *Waterhouse & Co.*; *Helder, Roberts & Co.*, for *Simpson & Co., Leeds*.

(1) [1906] 2 Ch. 235.

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Oct. 22.

*In re* WILSON.WILSON *v.* BATCHELOR.

[1906 W. 3154.]

*Will — Construction — Next of Kin according to the Statute — Time for ascertaining Class.*

A testator, who died in 1884, gave a life interest in a fund to his nephew S., and certain contingent interests to the children and issue of his said nephew, and declared that if no child or issue of his said nephew attained a vested interest, the fund was to be held "for such person or persons as on the death of my said nephew S. will be entitled to [*sic*] as my next of kin under the statute."

At the date of the death of the testator, the nephew S. was his sole next of kin. S. died without issue in July, 1906, having made a will and appointed executors:—

*Held*, that the persons entitled were to be ascertained at the death of the testator, and that the executors of S. were therefore entitled to the fund; that even if the words "at the death of my nephew S." were equivalent to "then," they referred only to the time when the persons entitled would come into possession of what had been bequeathed to them, as laid down by *Bullock v. Downes*, (1860) 9 H. L. C. 1.

Decision of Parker J., [1907] 1 Ch. 450, affirmed.

THIS was an appeal from a decision of Parker J. (1)

The question raised by this appeal was the period at which the class to take under a gift to the next of kin according to the Statute of Distributions ought to be ascertained. The will and the facts are given in detail in the report of the case in the court below, and the following summary is considered sufficient for the purposes of this report.

William Wilson, who died in May, 1884, gave by his will a life interest in the trust fund to his nephew Samuel Eyres Wilson, and certain contingent interests to the children or issue of his said nephew on their attaining twenty-one, or in the case of daughters marrying, with full powers to his trustees for the maintenance and advancement of his said nephew's children or issue, and declared that if no child or other issue of his said

(1) [1907] 1 Ch. 450.

nephew lived to attain a vested interest under the trusts therein before contained, his trustees should hold the trust fund "in trust for such person or persons as on the death of my said nephew Samuel Eyres Wilson will be entitled to [*sic*] as my next of kin under the Statute for the Distribution of Intestates' Estates."

At the date of the death of the testator, in May, 1884, the nephew Samuel Eyres Wilson was his sole next of kin.

In July, 1906, Samuel Eyres Wilson died without issue, having made a will and appointed executors.

A summons having been taken out for the purpose of determining the period at which the class of next of kin under the above bequest ought to be ascertained, Parker J. held that the class to take were the next of kin of the testator at the time of his death, and not the class who would have been his next of kin had he died in July, 1906, and consequently that the executors of Samuel Eyres Wilson were entitled to the trust fund.

The next of kin at the date of the death of Samuel Eyres Wilson appealed.

*Buckmaster, K.C., John Dixon, and E. A. Jennings*, for the appellants. The event upon which the trust fund is to go to the next of kin is the failure of the nephew's children at the death of the nephew; and it is at the death of the nephew that the class of next of kin must be ascertained. The will shews that the class to take is to be ascertained at a date later than the death of the testator, otherwise he might as well have said, "On failure of issue I give this to the representatives of my nephew." The words must mean something different from that; the words "on the death of my nephew" cut down the gift, which otherwise would have referred to next of kin at the testator's death, and give it to an artificial class to be ascertained at the death of the nephew. A testator may create an artificial class of next of kin if he thinks fit so to do, and that is what this testator has done. The fact that the nephew was the sole next of kin of the testator in 1884 is a circumstance which cannot be overlooked. There is nothing in the authorities requiring the Court to come to a different conclusion; there are in many of the cases dicta in

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favour of the present contention. The distinction suggested runs through a series of authorities which were all discussed in *Wharton v. Barker*. (1) [*Bullock v. Downes* (2) and *Mortimore v. Mortimore* (3) were cited at length and criticized.]

*Sturge and Great Western Ry. Co.* (4) seems to shew that the rule supposed to be laid down in *Bullock v. Downes* (2) is not an absolutely rigid rule.

*Upjohn, K.C., Mark Romer, K.C., and Christopher James*, for the executors of Samuel Eyres Wilson, were not called upon.

*W. H. Cozens-Hardy*, for the trustee of the will.

COZENS-HARDY M.R. This is an appeal from the decision of Parker J., and I might content myself with adopting the language of Lord Blackburn's judgment in *Mortimore v. Mortimore* (3), where he says: "I think the present case is quite undistinguishable from the case of *Bullock v. Downes*." (2) Having said that I have really said enough, but, out of respect to the able argument of Mr. Buckmaster, it is perhaps right that I should add just a few words. Apart from authority, and supposing this was the first time the case came forward, I should myself have arrived at the same conclusion as that which I am bound to arrive at by the decisions of the House of Lords.

The will is one under which a trust fund was given to a nephew, Samuel Eyres Wilson, for life, and then there are contingent interests to a class of sons attaining twenty-one, and daughters attaining twenty-one or marrying. Then there is this short gift. [His Lordship read the clause in question, and continued:—] The only persons who can be entitled as "next of kin under the Statute for the Distribution of Intestates' Estates" must, according to the express language of that statute, be ascertained at the testator's death. The will speaks of a class "who will be entitled as my next of kin under the Statute for the Distribution of Intestates' Estates," and that is a class which, as it seems to me, must be ascertained at the testator's death, notwithstanding the insertion of those words, "on the death of my said nephew Samuel Eyres Wilson." That is not a different

(1) (1858) 4 K. & J. 483.

(3) (1879) 4 App. Cas. 448, 453.

(2) 9 H. L. C. 1.

(4) (1881) 19 Ch. D. 444.

class. On the death of Samuel Eyres Wilson, the tenant for life, the statutory next of kin of the testator had an absolute title to his personal estate under the statute, though subject to be divested in the event of any child attaining a vested interest. With the greatest respect to the very interesting and elaborate argument which we have heard, I fail to see the great importance of the reference to "the death of my said nephew Samuel Eyres Wilson" as altogether altering the period at which the class would be ascertained. No doubt a testator may fix an artificial class of next of kin, and give to that class as persons who would be next of kin if he had died at a date different from that at which he did die, the persons so to take being entitled to a share under the statute. That is analogous to the familiar form in marriage settlements where a wife's fortune is given, in the event of there being no child or issue of the marriage who attains a vested interest, to what may be called an artificial class of persons, namely, to such persons as would be her statutory next of kin if she had died possessed of the fund intestate and without having been married, and then you would get a different class; you treat the wife as a person who had never been married, and you get a hypothetical class of next of kin, and I do not doubt that you might have the same provision in a will. In this case I can find nothing whatever to justify that conclusion. I desire to repeat what I said at the beginning, that I do not think it is open to me, if I had any doubt upon the matter, to come to any other view than that which was adopted by Parker J., and I entirely agree with every word of his judgment. In my opinion the appeal must be dismissed.

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FLETCHER MOULTON L.J. I agree.

FARWELL L.J. I am of the same opinion. I only wish to add one or two words on the construction of this particular will, because I agree with the Master of the Rolls that, even without the assistance of *Bullock v. Downes* (1) and *Mortimore v. Mortimore* (2), I should have come to the same conclusion. The gift is, after the life interest, in trust for

(1) 9 H. L. C. 1.

(2) 4 App. Cas. 448.



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such person or persons as on the death of Samuel Eyres Wilson will be entitled thereto "as my next of kin under the Statute for the Distribution of Intestates' Estates." If you omit the words "the death of my said nephew Samuel Eyres Wilson," it is to my mind perfectly clear that the gift is to the next of kin under the Statute of Distributions who can only be ascertained at the death, as the statute provides, of the testator. If the words "on the death of my said nephew" are read as equivalent to "then," which is possible having regard to the antecedent life interest, then the case is clearly governed by the cases in the House of Lords, and it is plain that the clear gift to the next of kin, the persons to whom the statute gives it, is not cut down or affected by the use of the word "then." Mr. Buckmaster was driven to argue that the insertion of the words "on the death of my said nephew Samuel Eyres Wilson" cut down the clear gift which I find without those words, in favour of persons to whom the statute gives it, that is to say, the only next of kin known to the law, and out of those words we are asked to elaborate a phrase, "To such persons as would on the death of my nephew be entitled as my next of kin if I had died at the date of the death of my nephew." I think it is absolutely impossible to cut down the clear words of the gift to the next of kin under the statute by converting the phrase "on the death of my said nephew Samuel Eyres Wilson" into such an extraordinary sentence as Mr. Buckmaster's ingenious argument invites us to do. I agree with the Master of the Rolls, also, in thinking we are bound by the two cases in the House of Lords.

Solicitors: *Peacock & Goddard, for Younge, Wilson & Co., Sheffield; J. W. Alton Bachelor.*

W. C. D.

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[1906 P. 2561.]

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*Letters—Biography—Authority to Write—Use of Information contained in Letters—Extracts and Paraphrases—Intention of Writer—Injunction.*

July 2, 3, 4,  
9, 24.

P. and his wife were authorized by W. to write his biography, but no express authority was given to publish any of his letters :—

*Held*, that P. and his wife were entitled to use the information contained in letters or documents written by W., which had lawfully come into their possession, for the purpose of compiling the biography, without any express or implied authority given by W. for that purpose; but they were not entitled to publish any letters of W., or any extracts therefrom, or paraphrases thereof.

So far as authority goes it is in favour of any use of letters except publication.

There is no warrant for extending the proprietary right to prohibit publication, and, so far as there is no rule of law of general application or created by special circumstances to prevent that result, the possession of a letter ought to be treated as conferring all the rights usually incident to property.

*Semble*, the intention of the writer of a letter is not a satisfactory test of the lawfulness of the use to which it is put.

## WITNESS ACTION.

The plaintiff Rosalind Birnie Philip was the sole executrix and residuary legatee of James Abbott M'Neill Whistler, the celebrated artist. The first two defendants, Joseph Pennell and Elizabeth Robins Pennell, his wife, were art critics and writers of books, and the remaining defendants, William Henry Heinemann and Sydney Pauling, carried on business under the style of William Heinemann as publishers of books.

James Abbott M'Neill Whistler died on July 17, 1903.

The plaintiff alleged that she was entitled to the sole right of publishing, or permitting the publication of, any letters or other documents written by J. A. M. Whistler and not published by him. Mr. and Mrs. Pennell were writing a biography of Whistler, which the other defendants intended to publish. The plaintiff alleged that Mr. and Mrs. Pennell had applied to various relations and personal friends of Whistler to procure letters or documents written by him, some of such documents being of a private and

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confidential nature, with the view of publishing the same or some of them as part of or included in the biography of Whistler, and to publish such letters and documents therein; or, in the alternative, that they intended to extract from such private and confidential letters or documents, or copies thereof, the substance, information and matters contained therein, and to publish the same as part of the biography.

The plaintiff accordingly claimed an injunction to restrain the defendants and each of them (1.) from printing or publishing any original letters or documents written by J. A. M. Whistler, or copies or extracts therefrom; and (2.) from printing or publishing the substance, information and matters contained in or extracted from such original letters or documents.

The defendants Mr. and Mrs. Pennell, by their defence, stated that in 1900 they were authorized by Mr. Whistler to write his biography, and that for this purpose he gave them a large amount of information. They admitted that the plaintiff was entitled to the sole right to prevent the publication of private letters and documents written by Mr. Whistler, and said that they did not propose, and had never threatened, to publish in the biography any letters or parts thereof written by Mr. Whistler, but they did propose, with Mr. Whistler's authority, to publish his biography and to use information as to his life and work contained in such letters. They admitted that they had, with the implied authority of Mr. Whistler, procured copies of certain of his letters to various relations and friends, but they did not propose to publish such copies, but only to use the information contained therein in compiling their biography. The defendants William Henry Heinemann and Sydney Pauling also admitted that the plaintiff was entitled to the sole right to prevent the publication of private letters or documents written by Mr. Whistler and proposed to be published without his authority, but stated that they intended to publish a biography written by Mr. and Mrs. Pennell and purporting to be authorized by Mr. Whistler. They further pleaded that in respect of the matters complained of in the action they had never threatened to do otherwise than in accordance with the rights of the plaintiff, and submitted that as against them the action was misconceived.

The writ in the action was issued on December 11, 1906, and an injunction applied for by the plaintiff. The motion stood over upon undertakings, and ultimately on April 22, 1907, Kekewich J. made an order directing the following issues to be tried, namely:—

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(1.) As between the plaintiff and the defendants Mr. and Mrs. Pennell—(a) whether the defendants Mr. and Mrs. Pennell, or either of them, were or was authorized by the late J. A. M. Whistler to write his biography; (b) whether the said authority (if any) extended to authorize the said defendants, or either of them, to print or publish any original letters or documents written by the said J. A. M. Whistler; (c) whether the said authority (if any) extended to authorize the said defendants, or either of them, to print or publish the information or matters contained in or extracts from the said letters or documents.

(2.) As between the plaintiff and all the defendants whether the defendants, or any of them, have threatened or intended to publish the said original letters or documents, or any of them.

The Court intimated that on the first issue the burden of proof was on the defendants, and Mr. and Mrs. Pennell deposed to the effect that Mr. Whistler assented to their writing a book on himself to be illustrated by means of artistic productions, and that he furnished Mrs. Pennell in particular, by means of verbal communications, with a large amount of material for the book. But no originals or copies of his letters were given to her, nor the contents communicated to her. Other evidence was also given, the effect of which is sufficiently summarized in the judgment.

*Stewart-Smith, K.C., Montague Lush, K.C., and F. D. MacKinnon*, for the plaintiff. With regard to the first issue, the difficult part is the word “authority.” Whistler did, no doubt, permit the defendants Mr. and Mrs. Pennell to write some book on him containing some biographical details. The whole of the case is, What did the authority comprise? The onus is on the defendants to make out that the authority comprised the looking into these letters, and the use of them for the purposes of the biography. There is no evidence of such authority, or



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Whistler's consent, and we submit that there was an intention to restrict the Pennells to that information which Whistler himself gave them. They were not entitled to go to private and confidential letters without Whistler's consent: *Prince Albert v. Strange*. (1)

There is nothing inconsistent with a mission to write a biography that the writers should be confined to the information which Whistler himself gave them, and which they could get under his authority, and the evidence is that letters were never referred to. Whistler had collected letters on his own artistic career, and gave his executrix directions as to them, and obviously he intended to retain some sort of control during his life, and that his executrix should have that control after his death. The inference is that he never meant that the Pennells should publish them. Moreover, we submit that the evidence shews that the book was to be a monograph on the man, rather than the life and letters of the artist.

This is a case, not of copyright involving a question of reproduction, but a case involving a question of publication, and we submit that the plaintiff is entitled to restrain the publication of these private and confidential letters or extracts therefrom, or information contained therein, unless on the face of them Whistler shewed that he intended the same to be published.

*Scrutton, K.C.*, and *Arnold Whitehead*, for the defendants Mr. and Mrs. Pennell. We submit that the evidence shews that these defendants were authorized by Whistler to write his biography, and we ask that issue (a) may be answered in the affirmative. We disclaim issue (b), as these defendants do not claim a right to publish any letters either verbatim, or in oratio obliqua, or in paraphrase. With regard to issue (c), we contend that these defendants, as members of the public, have the right to publish information contained in the letters, and they also claim the right by reason of the authority given to them by Whistler to write his biography. Such an authority might be an advantage in two ways --it might give greater weight to a request for information from Whistler's friends, and it might have the

effect of placing at the author's disposal subject-matter in the possession of Whistler. The real question, however, is whether these defendants are not entitled, as members of the public, to publish in a lawful manner information obtained from letters, provided that in so doing they do not infringe copyright.

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There is a great difference between information, whether oral or written, which is in the possession of a man and which is obtained from him by fraud or breach of confidence, and information obtained from a man willingly, or in a way to which he can raise no legal objection. In the former case the Court will restrain the publication: *Prince Albert v. Strange* (1); *Merryweather v. Moore*. (2) But where a man has parted with information voluntarily a much greater difficulty arises, for in that case what restrictions on the use of that information will the Court imply? No rule covering all the cases has ever been laid down. On the one hand, the receiver of a letter has such a property in it that if he sends it back he can recover it from the writer, or he can destroy or sell it. Some of the judges have thought that "property" was not the right word by which to describe this right, for if it were "property" in the strict sense, then upon bankruptcy it would pass to the bankrupt's trustee, who could publish the letter.

On the other hand, the proprietary right of the writer of documents, including letters, has been recognized for a long time. The foundation of the right seems to have been laid in the four cases in Chancery referred to in *Millar v. Taylor* (3), namely, *Webb v. Rose* (4), *Pope v. Curl* (5), *Duke of Queensberry v. Shebbeare* (6), and *Forrester v. Waller*. (7)

In *Pope v. Curl* (5) it was laid down that there was only a special property in the receiver of a letter; possibly the property in the paper might belong to him, but that did not give a licence to any person whatsoever to publish them to the world, for at most the receiver had only a joint property with the writer. In *Duke of Queensberry v. Shebbeare* (6) the Court granted an

(1) 2 De G. & Sm. 652; 1 Mac. & G. 25.

(2) [1892] 2 Ch. 518.

(3) (1769) 4 Burr. 2303.

(4) Unreported.

(5) (1741) 2 Atk. 342.

(6) (1758) 2 Eden, 329.

(7) Unreported.

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injunction to restrain the printing of the unpublished manuscript of Lord Clarendon's History, a copy of which had been given by the representative of the author to a person under whom the defendant claimed, but not with the intention that he should publish it. He might "make any use of it except that." The publication of private letters was restrained in *Thompson v. Stanhope* (1), *Earl of Granard v. Dunkin* (2), and *Lord Perceval v. Phipps*. (3) But although the Court will restrain the publication of private letters by the receiver of them, Lord Eldon in *Gee v. Pritchard* (4) said that it would not restrict him from reading them or shewing them to his friends, or reciting them in public company. All those cases go to shew that the writer of letters has a proprietary right in them sufficient to entitle him to restrain the publication, but that, on the other hand, the receiver of the letters is entitled to use them in some way, although not to publish them by the multiplication of copies. In the present case the publication of a letter means making known to the world at large the language in which the letter is composed.

The authorities do not go further than this, that the receiver of a letter may not multiply copies, but he may make any other use of it: *Hopkinson v. Lord Burghley* (5), where Lord Cairns said that publication was not a lawful purpose for which a letter could be used by the receiver; *Earl of Lytton v. Devey*. (6) The application for the injunction sought for here is also entirely premature, as the letters may be used rightfully: *Labouchere v. Hess*. (7) Upon the materials before the Court no injunction should be granted.

*P. O. Lawrence, K.C.*, and *Owen Thompson*, for the defendants *W. H. Hememann* and *S. Pauling*.

*Stewart-Smith, K.C.*, in reply. The case of *Duke of Queensberry v. Shebbeare* (8) is no authority for the general proposition that in any case the recipient of a letter or manuscript may make any use of it which he likes short of publication. Nor does the case of *Thompson v. Stanhope* (1), which was the case of Lord

(1) (1774) Amb. 737.

(2) (1809) 1 Ball & B. 207.

(3) (1813) 2 V. & B. 19.

(4) (1818) 2 Swans. 402, 416.

(5) (1867) L. R. 2 Ch. 447.

(6) (1884) 54 L. J. (Ch.) 293.

(7) (1897) 77 L. T. 559.

(8) 2 Eden, 329.

Chesterfield's letters. Publication means the communication to any one whatever except the addressee, and for the purpose of publication you need not multiply copies; communication to a third person would be sufficient. The executrix has a proprietary right in the information contained in the letters, and not only to the words and the composition. Some of the letters were confidential, and the seal of confidence can only be relaxed by the writer himself: *Palin v. Gathercole*. (1) No doubt it may be inferred from the contents of a letter that the writer did not contemplate any restriction upon the communication of its contents by the addressee, either to the public generally or to a limited class, but the onus is upon the defendants to shew that.

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On July 9 Kekewich J. dismissed the defendants W. H. Heinemann and S. Pauling from the action, and ordered the plaintiff to pay their costs. On the other issues his Lordship reserved judgment.

*Cur. adv. vult.*

July 24. KEKEWICH J. delivered the following written judgment:—This judgment is nominally limited to the issues of fact, which need not be restated, but, like the argument on those issues, covers wider ground. Although the first sub-division of issue No. 1 has been disposed of beyond controversy by the evidence, the result of that evidence must be summarized. This may be done briefly, because there is really no doubt concerning the effect of the evidence. Mr. Whistler, at the suggestion of Mr. Heinemann, assented to Mr. and Mrs. Pennell writing a book on himself. Except that Mr. Whistler was to be the subject of the book, and that it was to be illustrated by means of his artistic productions, it is by no means clear under what category the book was intended to fall, nor can there be said to have been any intention on the part of those concerned that it should be published or should not be published in Mr. Whistler's life-time. It is, however, obvious that a book on an artist illustrated by means of his works must be more or less biographical, and whether it would or would not be correctly termed a biography is immaterial.

(1) (1844) 1 Coll. 565.



KEKEWICH We know, however, that it was not contemplated to publish a  
J. life and letters. The question whether letters should be pub-  
1907 lished or not does not even appear to have been mooted, and I  
PHILIP infer that the illustration of the book by means of artistic pro-  
v. ductions tended to put aside illustration in a somewhat different  
PENNELL. sense by correspondence. Mr. Whistler went a step further than  
giving his assent to the book being written by Mr. and Mrs.  
Pennell, for he assisted them by furnishing Mrs. Pennell with a  
large amount of material, consisting mainly, if not entirely, of  
verbal communications to her, of which she took copious notes.  
It seems that he never gave her the originals or copies of any  
letters, or even communicated the contents of letters to her. I  
do not understand that she ever asked for any, and it must be  
taken that the subject of letters was not discussed. The short  
result is this. It is not pretended by the defendants that any  
authority was ever given by Mr. Whistler for the publication of  
any letters, but it is contended, and I think conclusively proved,  
that Mr. Whistler assented to and encouraged, and assisted in  
the compilation and publication of, a book on himself which must  
have been biographical, and that he may fairly and properly  
be said to have authorized Mr. and Mrs. Pennell to write  
his biography. That is the answer to the 1st sub-division of  
issue No. 1.

From what has been already said, the answer to the 2nd sub-division of the issue is also plain. That there was no express authority to print or publish any original letters or documents written by Mr. Whistler is abundantly clear, and I have no doubt that no such authority can be implied from authority to write a book on him, even though it must be a biography; and according to custom and experience, though not necessarily, a biography is not complete without reference to correspondence. We are here confronted by the right established by law of the writer of a letter during his life-time, and of his legal personal representatives after his death, to prevent the publication of letters written by him, as against which the implication of authority must be exceeding cogent to be of any avail at all. It is certainly not to be found in permission to write a biography which may be complete without a single extract from a single letter. The

2nd sub-division of issue No. 1 must therefore be answered in KEKEWICH J. the negative.

This brings me to the 3rd sub-division, which presents a question of great difficulty. Mr. and Mrs. Pennell agree that they are not at liberty to publish, in the sense of printing, or otherwise multiplying copies of, any letters or documents written by Mr. Whistler, and they further agree that the law which forbids their doing this extends to extracts from and paraphrases of letters. They have never contested, and do not contest, the right of the plaintiff to prevent any such publication. What they do contend is that, having obtained possession of original letters and documents written by Mr. Whistler, or copies of them, they are entitled to give to the world, through the medium of their book, such information respecting Mr. Whistler personally—his habits, character, opinions, and doings—as a study of his letters and documents affords, and they say that so long as they do this without publishing the substance of any document, of which they are not entitled to publish the words, neither the plaintiff nor any other person can interfere with them. Whether this contention is well founded or not is the question for decision. Before proceeding further to consider this it may be convenient to state the two points made on the other side. It is said, first, that what Mr. and Mrs. Pennell propose is lawful, and that the restricted use of letters and documents above mentioned is within the right of any one intending to publish a biography, wholly apart from the permission to write it given by the subject of the book; and, secondly, that even if the right is not so extensive as alleged, yet it cannot be laid down as a general proposition that no such use at all can be made of letters and documents, and that, therefore, an injunction to prevent what may turn out to be a lawful use ought not to be granted.

The authorities are numerous, and, especially *Millar v. Taylor*(1), interesting and instructive; but they are all open to the criticism of the plaintiff's counsel that they do not directly touch the point in hand. They all recognize what has been in recent years styled the proprietary right of the writer of documents, including letters, and of his legal personal representatives to

(1) 4 Burr. 2303.

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prohibit the publication of these documents, meaning by publication the multiplication of copies by printing or other process by which multiplication can be produced, but they also recognize the right of him whom I will call the possessor of the documents, though, I believe, he might with more accuracy be termed the proprietor, to use them in some manner falling short of publication. The manner of use is treated as extensive, but it is never defined, and in no case is there even laid down a rule which assists a definition, the question always being not what else is lawful, but whether publication is. Take, for instance, *Pope v. Curl* (1), in which Lord Hardwicke expressed the opinion—I am quoting from *Millar v. Taylor* (2)—that sending a letter transferred the paper upon which it was written, and every use of the contents except the liberty and profit of publication. The case about Lord Clarendon's History is another instance of a like character. There the Court was of opinion—I am again quoting from *Millar v. Taylor* (2)—that Mr. Francis Gwynn might make every use of the manuscript entrusted to him except the profit of multiplying in print. The case of *Gee v. Pritchard* (3), which was strongly relied on by the defendants, is really another of the same class. The Lord Chancellor, in granting an injunction against the publication of letters, recognizes in more than one passage the distinction between other use which is lawful, and the use by publication which is unlawful, but only to contrast the one with the other and to insist on the illegality of publication. The passage which was most relied on by the defendants (3) is also open to the remark that the Lord Chancellor is there speaking of a book, and not of letters, but, having regard to the subject-matter of the case and to the other observations of the Lord Chancellor, I think it must be taken that he intended what he said to apply to letters also.

There is another class of cases entirely different from those concerned with the right of the writer of letters, or his legal personal representative, to prohibit the publication of those letters, not on the strength of the proprietary right, but because of a confidential relation between the writer and the person attempting

(1) 2 Atk. 342.

(2) 4 Burr. 2303.

(3) 2 Swans. 402, 416.

to use the letters, which confidential relation, it is obvious, may and generally would make unlawful, not merely the publication of the letters, but any communication of their contents to third persons. To this class belong *Palin v. Gathercole* (1) and the cases, the orders in which are given in Seton on Judgments, 6th ed. vol. i. p. 684, and many others, including, of course, *Prince Albert v. Strange*. (2) Here I am not affected by any question of confidence. I have already mentioned that no letters were given by Mr. Whistler himself to Mr. and Mrs. Pennell, and, as regards those which have been obtained from other persons, I cannot see that any confidential relation subsists between Mr. and Mrs. Pennell and the plaintiff. Even assuming that some of those letters were in the hands of persons who could not communicate them without breach of confidence, which would give the plaintiff a cause of action against them, yet I fail to understand how that alone would give the plaintiff a right to prohibit Mr. and Mrs. Pennell from using the letters, or their contents, if handed over or communicated to them. It cannot be said that the confidence runs with the letters. I must not be understood as extending this opinion to letters obtained by fraud or otherwise improperly, and any case of that kind would have to be considered separately, and in view of the particular circumstances. There was a suggestion that Mr. and Mrs. Pennell had obtained some letters improperly, but I do not think that is justified by the facts, though some of their communications with persons from whom they hoped to obtain letters were wanting in accuracy of language, and for that reason open to criticism. ✓

With the class of cases treating of the circumstances under which, for exceptional reasons, the person to whom a letter has been written may publish it, notwithstanding the objections of the writer of the letter, I need not deal. They really are foreign to the question under consideration, and are useful only as illustrating the proprietary right which is thoroughly established. To this class belong *Labouchere v. Hess* (3), and some other cases cited in argument.

There may also be passed over cases in which the question

(1) 1 Coll. 565.

(2) 1 Mac. & G. 25.

(3) 77 L. T. 559.



KEKEWICH has arisen whether the proprietary right of the writer of a letter  
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extends to prevent its production in Court in the administration of justice, and I should not notice this point but for the language of Lord Cairns in *Hopkinson v. Lord Burghley*. (1) He says : “The writer is supposed to intend that the receiver may use it for any lawful purpose, and it has been held that publication is not such a lawful purpose. But if there is a lawful purpose for which a letter can be used, it is the production of it in a Court of justice for the furtherance of the ends of justice.” Properly understood, this language does not at all intimate what is the extent and limit of the phrase “any lawful purpose.” Lord Cairns was only asserting that production in Court is of that character. Observations above made on like general words in other cases are equally applicable here.

This brings me to the question whether the use of Mr. Whistler's letters, whether written to themselves or obtained from others, which Mr. and Mrs. Pennell propose, is a lawful purpose or not. On behalf of the plaintiff it is urged that the solution depends in each instance on the writer's intention. I doubt whether that is a satisfactory test, but perhaps no better can be found. Inquiry into intention must take one of two alternative forms. You must either inquire whether the writer intended a particular letter to be used in a particular manner, or whether he intended that it should not be thus used. The two run into one another, and in the following remarks they are treated as for practical purposes one. I adopt the proposition of the defendants that a man writing a letter, not marked or appearing on the face of it to be confidential, to a member of a family necessarily contemplates and must be taken to permit that the contents of the letter shall be communicated, or the letter itself read to the family assembled round the breakfast-table; and that permission must, I think, extend to common friends gathering at a club or elsewhere. But this is only a small step towards the solution of the larger question. We have all read letters written, some in early life and before the writer has attained eminence, which were obviously compiled with a view to ultimate publication, but, according to the ordinary habits of

(1) L. R. 2 Ch. 447, 448.

men, a letter written for no special purpose and on no special occasion is written without any intention as regards ultimate use after many years have elapsed, and the writer has been removed from the rank of living correspondents. What shall be done with such letters when the writer has ceased to have any personal interest in them is really not in his contemplation, and, as a general rule, it would be extremely difficult, if not absolutely impossible, to form any conclusion respecting his intention from the letters or the circumstances under which they were written.

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It may be assumed that a writer does not intend to have communicated, even at the breakfast table, a letter of libellous character, and it would be easy to add hypothetical cases falling within the same category. But why should a man intend or wish that letters telling of his own habits of life, and expressing his opinions on current topics of the day, or giving his views on more serious matters, political, social or religious, shall never see the light, shall never be used by his friends, admirers, or the world at large, for learning what his habits, opinions, and views were, and never be employed to assist others to follow his example, or to pursue and bring to maturity thoughts which crossed his mind? It is a recognized duty of every man, and more especially of a successful man in any profession, to make his life and experience useful to others, and it would be inconsistent with this to hold that a writer of letters must be presumed to have intended that those letters should not be used at some time or other, on a proper occasion and in a proper manner, towards that end. The legal right of prohibition may, no doubt, intervene to prevent that from being fully done; but if it can be done in part without contravening that legal right, why should the law invent a new rule to interfere with a useful result? I have put the inquiry in general terms, but it is particularly applicable to the case of a man like Mr. Whistler, who is spoken of on both sides as not only an artist, but an artist who loved art and anxiously desired to promote it.

Add to this the fact that Mr. Whistler not only knew of Mr. and Mrs. Pennell's intention to write a book on him, not merely assented to their doing so, but furnished them with materials for the purpose, and the inference that he intended

KEKEWICH them to make the book as complete as possible is extremely  
 J. strong. I cannot believe that in the fulfilment of their task he  
 1907 intended or wished to preclude them from referring to correspond-  
 PHILIP ence, that is, to letters written to or by him, which would neces-  
 v. sarily throw much light on his character, habits, and opinions,  
 PENNELL. and be of invaluable assistance in enabling them to bring that  
 task to a successful conclusion. It must, of course, be done  
 within the limits allowed by law, but within these limits their  
 liberty is large.

If, however, the true view be that no intention on the part of Mr. Whistler can properly be inferred, or if intention on his part really does not affect the question, which is my own opinion, we are thrown back on the position that there is no authority against any use of letters except publication, and that so far as authority goes it is in favour of any use with that exception. There is no warrant for extending the proprietary right to prohibit publication, and so far as there is no rule of law of general application, or created by special circumstances, to prevent that result, it seems to me that possession of a letter ought to be treated as conferring all the rights usually incident to property.

It is urged on behalf of the plaintiff that she has not seen the letters proposed to be used, and that, except for the profession of the defendants, she does not know how they may be used. This means, I understand, that there is some possibility, and even probability, or danger, that letters will be improperly used, and that, the mischief once done, the plaintiff will be without redress. That she will be without redress if an improper use is made of the letters must be conceded, for damages would be no adequate remedy, but I am not otherwise pressed with the argument. The plaintiff is not entitled to an injunction against the use of the letters because she fears that an improper use will be made of them, unless she can establish good grounds for such fears. I had occasion, many years ago, to consider under what circumstances a quia timet action is maintainable, and I said all that occurred to me as useful on the subject in *M'Murray v. Cadwell*. (1) I do not propose to

(1) (1889) 6 Times J. R. 76.

repeat anything then said or to refer to the subject further than by remarking that if I could foresee accidents as almost inevitable I should be disposed to prevent them by enjoining conduct which would give occasion for them. But, as already stated, Mr. and Mrs. Pennell have frankly admitted the proprietary right of the plaintiff to prohibit the publication of letters, and that this extends to extracts and paraphrases. They avow their intention to use the letters only as obtaining information which will enable them to tell the story of the man whose biography they are writing, and to portray him for the study of those who desire to be better acquainted with his life and character. That this will be a task of much labour and some difficulty I do not doubt, but I do not see why it should not be successfully accomplished, nor do I see any reason for not giving credit to Mr. and Mrs. Pennell for whole-hearted honesty in fulfilling their intentions plainly expressed.

Having thus expressed my opinion on the merits of the case, I find it difficult to give an answer on that footing to the issues stated in sub-divisions (b) and (c) of No. 1. I have already answered sub-division (a) of No. 1 in the affirmative, and No. 2 as regards the defendants other than Mr. and Mrs. Pennell in the negative. It is I think clear, on the pleadings and evidence, that the latter issue ought to be answered as regards Mr. and Mrs. Pennell also in the negative. But sub-divisions (b) and (c) of issue No. 1 raise questions which have not been argued and really do not require decision. I am quite prepared to hold that the authority given by Mr. Whistler to Mr. and Mrs. Pennell to write a book on him, which I have treated as equivalent to an authority to write his biography, did not extend to authorize them, or either of them, to print or publish any original letters or documents, and also that the same authority did not extend to authorize them to print or publish the information or matters contained in or extracted from the said letters or documents. That will not advance matters much. My decision is that Mr. and Mrs. Pennell are entitled to do what they propose entirely without any express or implied authority given by Mr. Whistler for that purpose. Discussion of the terms of judgment on the trial of the action must proceed on that footing.

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[After discussion, the plaintiff and the defendants not requiring any answer to the issues, and the Court being of opinion that Mr. and Mrs. Pennell were not entitled to publish any letters of Mr. Whistler, or any extracts therefrom or paraphrases thereof, it was ordered that the action be dismissed with costs, to be paid by the plaintiff.]

Solicitors: *Watkin Williams, Steel & Hart; Radford & Frankland; Lewis & Lewis.*

G. M.

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EADY J.

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Oct. 17

*In re* RUTTER.

DONALDSON v. RUTTER.

[1907 R. 264.]

*Marriage—Nullity—Marriage before Registrar—False Notice—Widow married in Maiden Name—Marriage and Registration Act, 1856 (19 & 20 Vict. c. 119), ss. 3, 17, 18, 19.*

In order to keep her second marriage secret, a widow, whose life interest under her first husband's will ceased on remarriage, was married before a registrar in her maiden name, the previous statutory notice given under the Marriage and Registration Act, 1856, s. 3, being false to the knowledge of both spouses in this and other respects:—

*Held*, that the marriage was valid and the widow's life interest had ceased.

*Holmes v. Simmons*, (1868) L. R. 1 P. & M. 523, 529; *Prowse v. Spurway*, (1877) 46 L. J. (P. D. & A.) 49; *Lane v. Goodwin*, (1843) 4 Q. B. 361; and *Mayhew v. Mayhew*, (1812) 2 Phillim. 11, applied.

#### ORIGINATING SUMMONS.

By his will, dated September 19, 1888, Henry Patterson Rutter, after appointing his wife, Jane Rutter, and the plaintiffs executors and trustees, devised and bequeathed his real and personal estate to his trustees upon trust for his wife for her life or until she should marry again, and from and after her decease or second marriage upon trust for certain remaindermen. The testator died on January 25, 1889, and his will was proved by all the executors. The personal estate was of small amount, and the only property now subject to the trusts of the

will was the real estate, the rents of which had been received by Jane Rutter up to February, 1907.

It now appeared that on November 26, 1891, Jane Rutter had gone through a form of marriage with Robert Harrison before the registrar at Newcastle-upon-Tyne. In order to keep this marriage secret she was described in the statutory notice given under the Marriage and Registration Act, 1856, s. 3, as Jane Wood, spinster (her maiden name). Her husband's name and occupation were correctly stated, but the addresses of both spouses were given as at Newcastle in order to give the registrar jurisdiction, whereas they were in fact at Amble, thirty miles off, in the Alnwick registry district. Both spouses were fully cognizant of and responsible for these false statements. The spouses at first lived in separate houses, but subsequently cohabited for a time, after which they separated. Robert Harrison died on November 16, 1904. There was no issue of this marriage.

This summons was issued to determine whether Jane Rutter's interest had ceased on November 26, 1891. If so, she was prepared to account for the past rents, so that it was unnecessary to consider when the fraud was first discovered.

*W. H. Cozens-Hardy*, for the neutral trustees.

*Eve, K.C.*, and *K. G. Metcalfe*, for Jane Rutter. Mere inaccuracies in respect of the christian names or residences of the spouses or other details would not render the notice bad or invalidate the marriage under the Marriage and Registration Act, 1856: *Holmes v. Simmons* (1); *Prowse v. Spurway*. (2) But "whether a notice in a wholly false name (which must be done fraudulently) could be properly held a notice at all, may possibly still be a question": per Lord Penzance in *Holmes v. Simmons*. (1) In the present case the wife's surname and description were false to the knowledge of both spouses, and the notice was clearly fraudulent. The false addresses are irrelevant to the question of validity under s. 17 of the Act, though rendering the parties liable to the penalties of perjury and forfeiture of property accruing by the marriage under ss. 18 and 19. But the false

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(1) L. R. 1 P. & M. 523, 529.

(2) 46 L. J. (P. D. & A.) 49.

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surname and description of the wife render the notice nugatory and the marriage void. This would clearly be so in the case of banns: *Wormald v. Neale*. (1)

*T. T. Methold*, for a remainderman. There is no analogy between a marriage by banns and a marriage by notice before the registrar. Marriage by notice more nearly resembles marriage by licence: *Holmes v. Simmons*. (2) "As to a licence in a false name, a wilful, fraudulent misdescription in the licence known to both parties, such as if occurring in banns would have invalidated the marriage, will not invalidate a marriage following such misdescriptive licence, for in a licence identity is the main object": Geary on Marriage, p. 55; *Bevan v. M'Mahon* (3); *Lane v. Goodwin* (4); *Clowes v. Jones*. (5) If the first husband had been alive at the date of the second marriage, the wife would have been guilty of bigamy: *Rex v. Penson* (6); *Reg. v. Rea*. (7)

*Eve, K.C.*, in reply. That would be so even if the second marriage were void apart from bigamy: *Reg. v. Allen* (8); so that bigamy cases are not relevant to the question of validity of the second marriage. The licence cases do not govern the case, as in a licence identity is the main object. In banns and notice cases the object is to give notice to parties interested.

[SWINFEN EADY J. In *Mayhew v. Mayhew* (9) Sarah White, spinster, was married by banns as Sarah Kelso, widow, and the marriage was held good, though both parties were aware of the misdescription.]

That was an exceptional case. In *Wormald v. Neale* (1) the wife's surname was wrongly published in the banns with a view of a clandestine marriage, and the marriage was held void although the name was correctly given at the marriage.

SWINFEN EADY J. (after stating the facts). The grounds put forward on the lady's behalf are not sufficient to avoid the forfeiture of her life interest on her second marriage. Sect. 17 of

(1) (1868) 19 L. T. 93.

(5) (1842) 3 Curt. 185.

(2) L. R. 1 P. & M. 523, 529.

(6) (1832) 5 C. & P. 412.

(3) (1861) 30 L. J. (P. D. & A.) 61.

(7) (1872) L. R. 1 C. C. 365.

(4) 4 Q. B. 361.

(8) (1872) L. R. 1 C. C. 367, 370.

(9) 2 Phillim. 11.

the Marriage and Registration Act, 1856, prevents any question of residence being raised in any proceedings touching the validity of a marriage once solemnized, and, though ss. 18 and 19 impose the penalties of perjury and liability to forfeiture of property accruing by the marriage on parties wilfully giving a false notice, they do not invalidate the marriage thereby procured: *Holmes v. Simmons* (1); *Prowse v. Spurway*. (2)

Marriages in false names have been held valid in many cases of marriage by licence. For instance, in *Lane v. Goodwin* (3) George Rudman was married by licence as George Neate, a name he had never gone by, but the marriage was held good, Lord Denman C.J. saying (4): "There is no authority for the general proposition that a marriage licence is made absolutely void by a mistake in the name of one party. The reason for which banns are held invalid on this account does not extend to licences."

There are even instances of marriage by banns in a false name being held good, as in *Mayhew v. Mayhew* (5), to which I referred during the argument, and in the present case it is quite impossible that the lady should take advantage of the false name and description to which she was a party in order to avoid the forfeiture of her life interest.

I therefore declare that her life interest was forfeited on her marriage to Robert Harrison on November 26, 1891.

Solicitors: *Brown & Woolnough, for Charles Percy & Son, Alnwick; Rawle, Johnstone & Co., for Booth & Lazenby, Newcastle-upon-Tyne.*

(1) L. R. 1 P. & M. 523, 529.

(2) 46 L. J. (P. D. & A.) 49.

(5) 2 Phillim. 11.

(3) 4 Q. B. 361.

(4) Ibid. 365.



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Oct. 24, 25.

*In re* PERKINS.  
BROWN v. PERKINS.

[1907 P. 1359.]

*Tenant for Life and Remainderman—Residue—Testator's Liabilities—Covenant to pay Life Annuity—Capital and Income—Apportionment—Simple Interest.*

A testator who had covenanted to pay a life annuity gave half his residue to trustees upon trust for his daughter for life, if and when she attained twenty-five, with remainders over.

Until the daughter attained twenty-five the income, subject to maintenance up to a specified amount, was to be added to capital. The daughter attained twenty-five on October 8, 1907. The residue was earning 3 per cent. interest:—

*Held*, that each future instalment of the moiety of the annuity payable out of the daughter's share must as it accrued be apportioned between capital and income, as follows, viz., calculate what sum with 3 per cent. simple interest from October 8, 1907, to the day of payment would have met the particular instalment. Charge that sum to capital, the balance to income.

*Allhusen v. Whittell*, (1867) L. R. 4 Eq. 295, and *In re Harrison*, (1889) 43 Ch. D. 55, 61, followed.

*In re Bacon*, (1893) 62 L. J. (Ch.) 445, and *In re Henry*, [1907] 1 Ch. 30, not followed.

ORIGINATING SUMMONS.

By an indenture dated December 15, 1886, William Perkins covenanted to pay his wife a life annuity of 300*l.* from December 25, 1886, by equal quarterly payments in advance on the usual quarter days.

By his will dated March 24, 1887, William Perkins, after appointing the plaintiffs executors and trustees, devised and bequeathed the residue of his estate, both real and personal, to his trustees upon trust as to one moiety, if and when his son should attain twenty-five, and if he should not then be an uncertificated bankrupt, &c., to pay the income to his son during his life, or until he should become bankrupt, &c., with remainders over, and as to the other moiety, if and when the testator's

daughter should attain twenty-five, to pay the income to her during her life for her separate use without power of anticipation, with remainders over.

The will contained an express power of maintenance up to specified annual amounts out of the income of the expectant shares, the residue of the income to be accumulated and added to capital.

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The testator died on May 27, 1888.

His clear residue, subject to the 300*l.* annuity, was at present represented by about 130,000*l.* Consols.

The testator's daughter attained twenty-five on October 8, 1907, and his son would attain twenty-five on June 18, 1910. There were no remaindermen yet in existence. While the daughter was under twenty-five the 300*l.* annuity had been paid out of the general income of the residue, and no part had been charged to capital. The annuitant was about forty-one years old at the testator's death, and was now about sixty.

This summons was issued to determine how the moiety of the annuity payable out of the daughter's share ought in future to be borne as between capital and income.

*Bryan Farrer*, for the trustees. No question arose till the daughter attained twenty-five. Until then she was only entitled to maintenance out of the income, and the residue was carried to capital under the will, so that it made no difference how the annuity was paid. On October 8 she became life tenant of her moiety, and that moiety will have to bear half the annuity, viz., 150*l.* a year. Now what is the daughter life tenant of? Certainly not of 65,000*l.* Consols gross residue, but of 65,000*l.* Consols minus the capitalized value of the future instalments of the 150*l.* annuity. That is the true net residue of which she is life tenant: *Allhusen v. Whittell* (1); *In re Harrison* (2); *Fletcher v. Stevenson*. (3) To pay the whole of each instalment as it accrues out of the capital of the gross residue, as in *In re Bacon* (4), followed in *In re Henry* (5), is virtually to ignore the true residue rule, as the

(1) L. R. 4 Eq. 295.

(3) (1844) 3 Hare, 360, 371.

(2) 43 Ch. D. 55, 61.

(4) 62 L. J. (Ch.) 445.

(5) [1907] 1 Ch. 30.

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life tenant would receive the income of that instalment until payment, though not true residue.

On October 8, 1907, the present value of the annuity was chargeable to capital. In other words, the present value of each future instalment was chargeable to capital. Each instalment as it accrues should therefore be discounted back to that date, and the discounted amount charged to capital. That is the strict method pointed out by the life tenant in *In re Bacon*. (1) In that case Kekewich J. attached great weight to the order in *In re Muffett* (2), but if that order (Seton on Judgments, 6th ed. p. 1634) really means that each instalment of the annuity as it accrued was to be paid out of capital it is inconsistent with the judgment, which directed the annuity to be treated as if capitalized with adjustment of the instalments on that footing. It would probably be simpler to value the life estate and reversion as on October 8, 1907, and apportion each instalment in that fixed proportion. This would in substance accord with the plan adopted in *In re Dawson* (3), following *Yates v. Yates* (4), and though not rigidly accurate, it is very convenient.

*Micklem, K.C.*, and *Waggett*, for the life tenants. The instalments should be paid out of capital: *In re Bacon* (1); *In re Henry* (5); but failing that, the strict rule should be applied, as, having regard to the comparative ages of the daughter and the annuitant, the valuation method of *In re Dawson* (3) would work unfairly against income.

SWINFEN EADY J. (after stating the facts). The question is how the moiety of the annuity payable out of the daughter's share ought in future to be borne as between capital and income. The daughter contended that, having regard to the comparative ages of herself and the annuitant, an apportionment according to the values of the life estate and reversion, as in *In re Dawson* (3), would work unfairly against income, and that the strict rule of *Allhusen v. Whittell* (6) ought to be applied. The only question is how best to apply it. In *In re Harrison* (7),

(1) 62 L. J. (Ch.) 445.

(2) (1888) 39 Ch. D. 534, 537.

(3) [1906] 2 Ch. 211.

(4) (1860) 28 Beav. 637.

(5) [1907] 1 Ch. 30.

(6) L. R. 4 Eq. 295.

(7) 43 Ch. D. 55, 61.

a case of a specific devise, North J. says: "The decision in *Allhusen v. Whittell* (1) . . . was based on the principle that the tenant for life of the residue of a testator's estate is not tenant for life of the whole estate, but of the whole estate minus something, and that something must be ascertained before it can be said of what he is tenant for life. He is not tenant for life of the whole estate, and he is not entitled to receive the whole income, and the rule in *Allhusen v. Whittell* (1) was adopted as a convenient and fair rule—for ascertaining the share of the estate which really represented residue, and of which the tenant for life was entitled to receive income, as distinguished from the entire estate."

If I were to say that all future instalments of the moiety of the annuity were to be paid out of capital, I should not be applying the rule in *Allhusen v. Whittell* (1) at all, and should be throwing an unfair burden on capital. Suppose the annuitant and daughter were to live just ten years more, and the capital of the daughter's moiety were 1500*l*. Then the capital would be entirely exhausted in paying the annuity, so that the remainderman would not receive anything, while the daughter would have been receiving some interest each year as long as the capital lasted. This is obviously not a fair apportionment between life tenant and remainderman.

The true rule is that contended for by the life tenant in *In re Bacon* (2), viz., "The proper course is to deal with each payment as it accrues . . . that is to say, ascertain what sum set aside at the death of the testatrix and accumulated at 4 per cent. would have met the particular payment, and attribute that part of the payment to capital . . . and attribute the remaining part to income." That method does apply, as nearly as may be, the rule of *Allhusen v. Whittell* (1), and gives to the persons interested in the capital and income their proper shares respectively.

There is not any difficulty in applying that rule *mutatis mutandis* in the present case. As the residue is invested in Consols, which at their present price pay 3 per cent., the calculation should be made at that rate.

(1) L. R. 4 Eq. 295.

(2) 62 L. J. (Ch.) 445.

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There will be a declaration that as from October 8, 1907, each instalment of the moiety of the annuity payable out of the daughter's share must as it accrues be apportioned between capital and income by calculating what sum with interest at 3 per cent. from October 8, 1907, to the day of payment would have met the particular instalment. The sum so ascertained is chargeable to capital, the balance to income.

An apportioned part of the instalment payable on December 25 will of course be payable out of the estate generally, but the balance will be dealt with on the above footing.

*Micklem, K.C.* The calculation should be made at simple interest.

SWINFEN EADY J. Yes.

Solicitors: *Frank Richardson & Sadlers; Laytons.*

G R. A.

PARKER J.

JARY v. BARNSELY CORPORATION.

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[1905 J. 1892.]

July 8, 9, 10.

*Sewer and Sewage Works—Right to Support of—Mines and Minerals—Adjacent Lands—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 15, 16, 175, 176, 308; Public Health Act, 1875, (Support of Sewers,) Amendment Act, 1883 (46 & 47 Vict. c. 37), ss. 2, 3, 4, 5.*

In August, 1875, an Act was passed confirming a provisional order of the Local Government Board enabling the corporation of B. to acquire certain specified lands, under the Lands Clauses Consolidation Acts, for the purpose of carrying out sewage works.

In October, 1875, the corporation gave notice to treat, in respect of some of these lands (except the mines and minerals), to the owner thereof.

The question of compensation was referred to arbitration, and in August, 1876, a sum was awarded to the landowner as compensation for the lands with the exception of all minerals.

The corporation having paid the compensation money, the landowner in May, 1878, conveyed to the corporation the lands, except the mines and minerals under the same, reserving to the owner for the time being thereof full power to work and carry away the same by means of underground workings only:—

*Held*, that by virtue of this conveyance the corporation acquired, by

common law—(1.) the natural right to support of the land conveyed by the subjacent minerals and the adjacent lands of the party conveying; (2.) a like right of support for any buildings or works then reasonably within the contemplation of the parties.

In April, 1876, the corporation gave the same landowner notice, under the Public Health Act, 1875, of its intention to construct an outfall sewer in, under, or through other lands of his. The landowner thereupon gave the corporation notice, under the same Act, claiming compensation in respect of this exercise of the corporation's statutory power. This matter was referred to arbitration under the Act, and in February, 1878, the umpire made his award, purporting to be under s. 308 of the Public Health Act, 1875, and giving the owner of the land for the time being in which the sewer was a rent-charge or annuity of so much per lineal yard of the sewer so far as it passed through the land. There was no evidence that the umpire had not taken into consideration the fact that the Public Health Act, 1875, conferred on the corporation the right of support for the sewer by the subjacent minerals, if not also by the land adjacent to the strip occupied by the sewer, as (having regard to *In re Dudley Corporation*, (1881) 8 Q. B. D. 86) it was held he ought to have done.

In 1904 the lessees of the mines under the land conveyed and the land in which the outfall sewer lay gave the corporation notice of their intention to work a seam of coal lying under or within forty yards of the sewage works and the outfall sewer. The corporation declined to treat as to payment of compensation, and claimed the right to support of the sewage works and the sewer.

The lessees, and the owners of the mines in the land conveyed and of the land in which the sewer lay, commenced in 1905 an action claiming declarations that, having regard to the Public Health Act, 1875 (Support of Sewers) Amendment Act, 1883, the corporation was not entitled to the support of either the sewage works or the outfall sewer by the subjacent mines, and that the plaintiffs were entitled to work the mines without paying compensation for any damage which would result from the working to the sewage works or sewer:—

*Held* that, on the true construction of s. 5 of the Act of 1883, the prior sections of the Act had no application to either the sewage works or the sewer, and that the rights of support of the corporation in respect thereof were unaffected by the Act.

On August 13, 1875, an Act (38 & 39 Vict. c. cexi.) was passed confirming a provisional order of the Local Government Board made to enable the corporation of Barnsley to acquire certain lands therein specified under the provisions of the Lands Clauses Consolidation Act, 1845, and the Acts amending the same, for the purpose of carrying out certain sewage works.

On October 27, 1875, the corporation gave a notice to treat, in respect of some of these lands (except the mines and minerals), to

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PARKER J. A. U. Wombwell, then the tenant for life thereof (the predecessor in title of the plaintiffs in the present action). The question of compensation payable was in due course referred to arbitration, and on August 9, 1876, a sum of about 20,000*l.* was awarded as the compensation payable for the lands comprised in the notice to treat, and for about two additional acres of land which had by agreement been brought within the terms of the reference. The award stated that the compensation was payable for the lands with the exception of all minerals. On May 9, 1878, the corporation having paid the compensation money, the property was conveyed to the corporation, the conveyance being of the land, except all mines and minerals lying within and under the same, and reserving to the owner for the time being thereof full power to work and carry away the same by means of underground workings only.

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On April 11, 1876, the corporation gave notice to Wombwell under the Public Health Act, 1875, of its intention to construct a certain outfall sewer in or under or through certain lands particularly referred to in the notice. He, as owner of the land or part of the land through which the sewer was to be laid, gave notice under the provisions of the Public Health Act, 1875, claiming compensation in respect of the exercise by the corporation of its statutory power, and that matter, too, was referred to arbitration under the Act in the usual way, and on February 19, 1878, the umpire in the arbitration made his award (purporting to be under s. 308 of the Public Health Act, 1875). This award was in somewhat unusual form. It recited the fact that the corporation had given notice to construct the sewer, that the claim for compensation had been made, and that the arbitrators and an umpire had been appointed; and then it proceeded as follows: "Whereas Adolphus Ulick Wombwell"—who at that time was, subject to certain charges, tenant for life with a general power of appointment over the land in question—"and the said corporation agreed by their agents or solicitors at the hearing of the said reference that the width of the land to be taken for the said sewer should be sixteen feet, and that the said Adolphus Ulick Wombwell or other the owner or owners of the said lands so to be taken, his or their heirs and assigns, should

have rights of herbage and passage at all points over the same (save and except the manholes and ventilators hereinafter mentioned) and also that the said Adolphus Ulick Wombwell or such owner or owners as aforesaid, his or their heirs and assigns, should have liberty to build on the said land sixteen feet wide or on any part thereof subject to the supervision of the surveyor of the said borough from time to time, so that no walls or other supports should interfere with the said manholes or ventilators or be placed upon the said sewer or elsewhere within the said sixteen feet so near to the said sewer as to endanger or damage it, and that the said corporation should have access to the said sewer at all proper times for inspection and repair thereof, and that the manholes and ventilators which have been already made in the said land sixteen feet wide should remain and be the absolute property of the said corporation, free from any interference by the said Adolphus Ulick Wombwell, or such owner or owners as aforesaid." Then followed an award, giving a rent-charge or annuity of so much per lineal yard of the sewer so far as it passed through the lands in question.

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There was no evidence whether the umpire did or did not include, in the amount of compensation, compensation for the right of support to the outfall sewer under the Public Health Act, 1875.

On August 25, 1883, there was passed the Public Health Act, 1875, (Support of Sewers,) Amendment Act, 1883. (1)

(1) 46 & 47 Vict. c. 37:—

Sect. 1: "This Act . . . shall be construed as one with the Public Health Act, 1875 (in this Act called the principal Act), as amended by the Acts for the time being in force amending the same."

Sect. 2: "In this Act,—

"The expression 'sanitary work' means any existing or future building or work constructed by or vested in or under the control of a local authority under the powers or for the purposes of so much of the principal Act or of any general or local Act or provisional order as relates to the construction or main-

tenance of any works of sewerage, drainage, sewage disposal, lighting, or water supply, and includes any fixtures, pipes, fittings, or apparatus connected with any such work, and belonging to or used by the local authority:

"The expression 'support' includes vertical and lateral support:

"The expression 'Sanitary Act' means the Act or provisional order under the authority of which a sanitary work has been or is constructed or is maintained, whether such Act or order was passed and confirmed before or after the commencement of this Act. . . ."



PARKER J. In July, 1904, the Barnsley Main Colliery Company, Limited  
 1907 (lessees of the mines and one of the plaintiffs), gave the

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Sect. 3: "The provisions of the Waterworks Clauses Act, 1847, sections eighteen to twenty-seven (both inclusive), with respect to mines, shall, in relation to any sanitary work of a local authority, be deemed to be incorporated with this Act and with the Sanitary Act under the authority of which such sanitary work has been or is constructed or is maintained, with the following modification (that is to say):—

"(1.) For the purposes of such incorporation the said provisions of the Waterworks Clauses Act, 1847, shall be construed as if the expression 'the undertakers' referred to the local authority, and as if the expression 'the special Act' referred to such Sanitary Act and this Act, and as if expressions relating to pipes, conduits, or other works referred to the sanitary work:

"(2.) The local authority, by or with any notice under the Waterworks Clauses Act, 1847, of willingness to treat for or make compensation, or of intention to prevent or interfere with the working of any mines, may specify and define the nature and extent of support which they require to be left, and any such notice may extend to minerals beyond the distance of forty yards mentioned in the said Act or to such less distance as the local authority think fit:

"(3.) As regards sanitary works existing at the passing of this Act the local authority shall cause the survey and map referred to in section nineteen of

the Waterworks Clauses Act, 1847, to be made within twelve months after the passing of this Act.

"(4.) The amount of any compensation in respect of support for a sanitary work payable by a local authority under the provisions of the Waterworks Clauses Act, 1847, as incorporated with this Act or the Sanitary Act, together with the costs of and incident to settling the same by arbitration or otherwise, shall be paid, charged, and borne in the same manner, and subject to the same powers and provisions as to borrowing and otherwise, as is provided with respect to the expenses of the construction or maintenance of the sanitary work by the Sanitary Act.

"(5.) A local authority may from time to time make agreements with the owners, lessees, or occupiers of or the persons working any mine for compromising any claim made or to be made in respect of anything done or omitted before the passing of this Act in relation to the matters in this Act mentioned or otherwise for carrying into effect the purposes of this Act in relation to the past or future working of mines.

"The provisions of this Act shall apply to every sanitary work as defined in this Act, whether the land on, in, over, or under which such work is situate is or is not vested in or occupied by the local authority, and is or is not wholly or partially

corporation notice of its intention to work a seam of coal lying under or within forty yards of the sewage works and outfall sewer. The corporation declined to treat for payment of compensation, and claimed the right to support of the works and sewage outfall.

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In 1905 the plaintiffs, the owners of the minerals excepted from the conveyance and of the land in which was the outfall sewer and the colliery company, commenced an action claiming— (1.) a declaration that upon the true construction of the Act of 1883, and of the other Acts and of the provisional order, award, and conveyance, and under the circumstances, the corporation was not entitled to have the outfall sewer and the other sewage works supported by the underlying minerals; and (2.) that upon the true construction and under the circumstances aforesaid the corporation would not, if the plaintiffs proceeded to work the minerals and in so doing caused damage to the outfall sewer and the other sewage works, be entitled to compensation in respect of such damage.

dedicated to the public as a street, highway, or public place.”

Sect. 4: “Except as in this Act provided, a local authority shall not by reason only of anything contained in the Sanitary Act under the authority of which a sanitary work has been or is constructed or maintained be deemed to have acquired or to be entitled to or to be bound to acquire or make compensation for any right of support for such sanitary work as against any person owning or working or being lessee or occupier of or entitled to work or otherwise interested in any mine; and nothing in such Sanitary Act shall be deemed to have subjected or to subject any such person to any liability to the local authority in respect of damage to a sanitary work caused in or consequent upon the working of any mines in a reasonable and proper manner.”

Sect. 5: “Nothing in this Act shall

be construed to repeal, invalidate, or affect any express enactment in a Sanitary or other Act with respect to rights of support for sanitary works, or any agreement made before the passing of this Act with respect to such rights, or to affect any action, arbitration, or other legal proceedings concluded before or pending at the passing of this Act.

“Where any right of support has been acquired before the passing of this Act by a local authority in respect of any sanitary work, and no compensation is at the passing of this Act recoverable in respect of such right, nothing in this Act shall be construed to apply to the work in respect of which such right has been acquired, or operate to deprive the local authority of such right or to entitle any person to any compensation in respect thereof, to which such person would not have been entitled if this Act had not been passed.”

PARKER J. The action was tried by Parker J. on July 8, 9, and 10,  
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*Levett, K.C., Buckmaster, K.C., and MacSwinney*, for the plaintiffs. The defendant corporation is the local authority which is invested with the powers of the Public Health Act, 1875, as amended by subsequent Acts. One of those amending Acts is the Public Health Act, 1875, (Support of Sewers,) Amendment Act, 1883, and the questions involved in this action arise on the construction of that Act. The sewage works and outfall sewer constructed by the corporation are "sanitary works" within the meaning of s. 2 of the Act of 1883. In the case of the sewage works the "Sanitary Act," within the meaning of the same section, is the provisional order which was confirmed by the Legislature on August 13, 1875.

The general effect of the Act is said to be "to place sewers and other sanitary work constructed by a local authority on a similar footing to railways and waterworks constructed under the Railways and Waterworks Clauses Acts; and therefore to negative the application of the doctrine of implied grant. . . . Compliance with sub-s. 3 of s. 3 (so far as that enactment is not saved by s. 5) is a condition precedent to the right of a local authority to recover for injury from subsidence. For the purpose of negating the doctrine of implied grant the Act is retrospective . . . and the section which negatives the doctrine (s. 4) refers to existing, as well as future, 'works.' The result was, not merely to alter the law for the future, but to deprive local authorities of the right of support which they then already possessed under the decisions in *In re Dudley Corporation* (1) and similar cases. . . . Sect. 4 makes the Act retrospective as regards implied grant; and it can hardly have been intended to give back by s. 5 what was taken away by s. 4. A saving clause may be repugnant and void. And the cases of express enactment and agreement are in terms dealt with by the previous part of s. 5. The expression 'has been acquired' in s. 5 apparently therefore refers (1.) to the case of express non-statutory grant and (2.) to the case of enjoyment for twenty years before the passing of the Act":

(1) 8 Q. B. D. 86.

MacSwinney on Mines, 3rd ed. pp. 378, 379. Sect. 3 of the Act of 1883 applies to sanitary works under that Act, including existing sanitary works, the mineral code of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), ss. 18 to 27, subject to some modifications. By s. 18 of the Act of 1847, as adopted, the local authority is not entitled to any mines or minerals under any land purchased by it, except such parts thereof as are necessary to be dug or carried away or used in the construction of the sanitary works, unless the same mines have been expressly purchased, and such mines, except as aforesaid, are to be deemed to be excepted out of the conveyance unless expressly conveyed. Here the conveyance did except the mines. Sect. 22 (as modified) requires notice to be given by the mine-owners to the local authority of the intention to work, and s. 23 provides that if within a certain time notice to treat is not given the mine-owners may work the mines in the usual manner. Sect. 3, sub-s. 4, of the Act of 1883 shews that it was not the intention of the Legislature to exempt the local authority from the obligation of paying compensation for excepted mines, the working of which they had stopped by notice under s. 22 of the Act of 1847. It has now to be decided what the retrospective operation of the Act of 1883 is. The corporation says that it is entitled to the common law right of support to the minerals; we say that that right, if any, is taken away by the Act of 1883. The concluding provision of s. 3 is operative as to the outfall sewer. By s. 4 of the Act of 1883, "except as in this Act" provided, the local authority is not by reason only of anything in the Sanitary Act to be deemed to have acquired or be bound to pay compensation for the right to support of a sanitary work, and the Sanitary Act is not to be deemed to have subjected the mine-owner to liability to the local authority for damage to the sanitary work caused by "the working of any mines in a reasonable and proper manner." Sects. 3 and 4 are sufficient to support the plaintiffs' contention, and the result is that, unless there is something in s. 5 to take their right away, they may work the mines—and that without making compensation for damage, provided they work in a reasonable and proper manner—if the corporation will not take the mines and pay compensation for them. In

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PARKER J. other words, unless you can find some express enactment in the Act of 1883 to the contrary, s. 3 of it alters the law as laid down in *In re Dudley Corporation* (1), viz., that under the Public Health Act, 1875, the landowner was bound to support a sewer running through his land, but had a right to immediate compensation for being deprived of his free power to work the subjacent mines. Whatever right of support the corporation had before 1883 is taken away unless some express enactment can be found in the Act of that year preserving the right. Sect. 3 covers the case of the sewage works in the lands conveyed, and s. 4 covers the case of the outfall sewer, if that case is not covered by s. 3. The corporation had no common law right to place a sewer on our land; its only right was a statutory one.

Then is the right taken away from the corporation by s. 4 restored by s. 5, or, rather, does s. 5 except the present case from the operation of the previous section? The meaning of the first part of s. 5 is that if any previous statute or provisional order has expressly given the right to support, or if that right has been acquired by agreement, the right is not to be affected by the Act of 1883. In the present case the Sanitary Act did not expressly give the right to support; if there had been any agreement as to the right of support, that would not be affected; but there was no agreement here. The second part of s. 5 refers in terms to cases where a right of support "has been acquired" before August 25, 1883, and no compensation is then recoverable in respect of it, and says that in that case the right of support is not to be taken away, and no person is to be entitled to compensation who would not have been so entitled before August 25, 1883. The expression "has been acquired" in that provision means has been acquired by virtue of an express enactment in a special Act, or by virtue of an express agreement, and in such a case no compensation is to be payable if it were not previously payable, but that enactment must not be read so as to do violence to s. 4.

The corporation has never paid any compensation for the right to support, and must either give us notice to treat or leave us alone and let us work in a reasonable and proper manner, in which case we are not bound to pay compensation for damage

caused by so working. The awards made were only for the land taken or used. PARKER J.

[PARKER J. referred to *Manchester Corporation v. New Moss Colliery, Ltd.* (1)]

The mere incorporation of the provisions of the Waterworks Clauses Act, 1847, is sufficient to shew that the corporation has no right to support, at any rate of the sewage works in the land conveyed, without paying compensation for it. The conveyance was by a tenant for life, and the corporation holds only under the statutory title which he as a limited owner could give to the corporation. The conveyance was made on the footing that the mines were not included. It rather negatives the right of support and gives no right except the statutory right. Where a mining code is created, the ordinary law as to support is got rid of, and the undertakers or local authorities, as the case may be, can take only what is necessary for their works, and all the rest is left to be dealt with when the time for working the mines arrives: *Great Western Ry. Co. v. Bennett.* (2)

There is a difference "between the effect of a saving clause or exception and a proviso in a statute. When the proviso appended to the enacting part is repugnant to it, it unquestionably repeals the enacting part; but it is said by Lord Coke that when the enactment and the saving clause (which reserves something which would be otherwise included in the words of the enacting part) are repugnant, . . . the saving clause is to be rejected, because otherwise the enactment would have been made in vain": Maxwell on the Interpretation of Statutes, 4th ed. p. 234, citing *Alton Woods' Case* (3), and referring to *Yarmouth Corporation v. Simmons.* (4)

The difference between the common law right and the statutory right is shewn in *Caledonian Ry. Co. v. Sprot.* (5) Sect. 4 of the Act of 1883 cannot cut down the effect of s. 3, and s. 4, in the words "except as in this Act provided," refers only to s. 5, which is a saving clause. The onus of shewing

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(1) [1906] 2 Ch. 564. (3) (1600) 1 Rep. 40b, 47a.  
(2) (1867) L. R. 2 H. L. 27, 40, 41. (4) (1878) 10 Ch. D. 518.  
(5) (1856) 2 Macq. 449.

PARKER J. that this case is within s. 5 lies on the corporation, and if the corporation is right in its contention, s. 5 rubs out s. 3 except as to works constructed after August 25, 1883.

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[They also referred to *Clippens Oil Co. v. Edinburgh and District Water Trustees* (1) ; *London and North Western Ry. Co. v. Evans*. (2)]

PARKER J. referred to Lumley's Public Health, 6th ed. p. 510.]

*Warmington, K.C., John Dixon, and Dighton Pollock*, for the corporation. We owe this discussion to a discovery made about twenty-four years after the Act of 1883 was passed. The corporation has in fact already paid compensation on the footing that the law was different from what the plaintiffs say it was. In the Act of 1883 there is no reference to a conveyance. In 1879 the corporation acquired by conveyance the common law right of support for its sewage works. No right of letting down the ground, as it then was, by working mines was expressly reserved to the mine-owner, and no such reservation can be implied: *London and North Western Ry. Co. v. Evans*. (2) The plaintiffs say that the corporation's right to support is taken away by the Act of 1883. No doubt an Act of Parliament can take away the rights of persons without giving them the right to compensation, but to say that an Act so provides is not the natural way of reading statutes. Wombwell was not only the tenant for life of the property conveyed, but in effect the equitable owner in fee. Some of the plaintiffs are the devisees of Wombwell, and, if the corporation had not got the fee simple, would be bound to give it to the corporation under the covenant for further assurance. That covenant is sufficient to prevent the plaintiffs claiming against the conveyance. The conveyance was not under the Lands Clauses Act, but in pursuance of agreement, and compensation was paid on the footing that the minerals should not be taken by the corporation. But the right to support was paid for, and that right is not taken away by the Act of 1883. The Act shews throughout an intention not to disturb matters which at the date of its passing had been concluded. Under the Public Health Acts roads vest in the local authority

(1) [1904] A. C. 64.

(2) [1893] 1 Ch. 16.

without conveyance; so do sewers and drains. Although the land in which the outfall sewer is laid does not vest in the corporation, the line of its pipes does. This being so, the words of the Act of 1883 are satisfied without acceding to the contention on behalf of the plaintiffs. If the plaintiffs were right, no local authority could have a right to support although granted to it by a conveyance. To take away absolute rights clear words to that effect are required, and the plaintiffs have failed to point out such words. Sect. 5 is the dominant section of the Act, and the plaintiffs' argument is inconsistent with it. The conveyance admittedly gave us the right of support, and s. 5 preserves it. That section is not inconsistent with the previous clauses of the Act. It may be called a saving clause, but it is a very different sort of saving clause from the saving clause referred to by Coke. The last paragraph of s. 3 does not apply in the case of a conveyance operating at common law, whether the right to support is thereby expressly or impliedly given. In the case of the outfall sewer the award is inconsistent with the plaintiffs' contention. In this case also the right to support has been obtained and paid for.

*Levett, K.C.*, in reply. If s. 5 is the dominant section of the Act of 1883, all rights obtained before the Act passed are saved by the section. The whole Act, however, shews an intention to alter the law as to sanitary works, past and future, in so far as minerals are concerned; it takes away common law rights and substitutes a mineral code. Sect. 5 is not the dominant clause. It is an exception which does not operate on the previous provisions, on which the plaintiffs rely. The Act applies a mineral code which did not previously exist as regards sanitary works. If the Act did not apply to existing common law rights, there would be no necessity for the provision as to plans in sect. 3, sub-s. 3. There might have been a right to support before the Act apart from any statute, and there is therefore something on which the second part of s. 5 could operate, without its being applied to a case like this. The conveyance must have been under statutory powers, otherwise it could not operate as it purports to do. [He referred to *Dalton v. Angus*. (1)]

(1) (1881) 6 App. Cas. 740.

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PARKER J. PARKER J., after stating the facts down to and including the conveyance of May 9, 1878, continued :—It is to be observed that neither the Lands Clauses Acts nor the Waterworks Clauses Act applied to this transaction. The right of the corporation to the support of the surface which it acquired by the underlying minerals which were excepted from the conveyance, or its rights to the support of the surface it acquired by the adjacent land, would depend entirely upon the doctrines and principles of the common law as applied to the conveyance in question, and not on any substantive statutory enactment. [After referring to the notice of April 11, 1876, his Lordship continued :—]

The corporation had power to make such sewer under the provisions of the Public Health Act, 1875, without acquiring the land in, through or under which the sewer was intended to be laid, provided that it gave certain notices required by the Act, and provided also that it paid compensation under s. 308 of the Public Health Act for any damage or injury caused by the exercise of the power to construct the outfall sewer. [His Lordship referred to the notice given by the landowner claiming compensation, and the umpire's award of February 19, 1898 (which award, he said, was "in somewhat unusual form"), and after stating the material portions of the award, continued :—]

It seems to me to be open to some doubt whether an award in that form could have been made except by agreement between the parties, but at the same time that award purports to be an award under s. 308 of the Public Health Act, 1875, and I think that it would be held to include all damage which under the provisions of that Act was payable in respect of the exercise by the corporation of its power to lay the outfall sewer. It is quite clear, having regard to *In re Dudley Corporation* (1), that in making the award the umpire ought to have taken into his consideration the fact that the Act of 1875 inferentially, if not expressly, confers on the corporation a right of support for the sewer then made through the land in question by the minerals underlying such land, if not also by the land adjacent to the strip actually occupied by that sewer. I have no evidence at all that he did not take into consideration what he ought properly

(1) 8 Q. B. D. 86.

to have taken into consideration in making his award. The plaintiffs are the owners of the mines and minerals excepted from the conveyance I have mentioned, and they are also the owners of the land in which the outfall sewer was made.

On August 25, 1883, there was passed an Act intituled, "The Public Health Act, 1875, (Support of Sewers,) Amendment Act, 1883," and it is material to consider what were the relative rights of the plaintiffs, or their predecessors in title, and of the corporation, immediately prior to the passing of that Act. First, with regard to the land comprised in the conveyance, it is, I think, clear—and indeed I do not think it was disputed by the counsel who argued the case—that the corporation had by that conveyance acquired: (1.) the natural right to support of the land conveyed to it by the subjacent minerals and the adjacent lands of the conveying parties; and (2.) a like right of support for any buildings or works reasonably in the contemplation of the parties when the land was conveyed. Again, with regard to the outfall sewer, the corporation had clearly, having regard to the decision in *In re Dudley Corporation* (1), acquired by virtue of the Act of 1875 a right to have the sewer supported by the land in which it was laid, and I think probably also by the adjacent land, so far at any rate as such adjacent land was in the same ownership as the land occupied by the sewer.

The question is whether these rights have been altered or varied in any way by the Act of 1883. That Act does not appear to me to be at all easy to construe, but I think that in construing it I ought to bear in mind, or at any rate am justified in bearing in mind, that the Legislature does not as a usual rule take away or alter existing vested rights without using the clearest language in that behalf, and without providing some sort of compensation for the persons who are deprived of their vested interests.

The first section of the Act of 1883 provides that it is to be construed as one with the Public Health Act, 1875 (therein called "the principal Act"), as amended by the Acts for the time being in force amending the same. The second section of the Act is a definition clause, and defines the meanings which certain expressions are to have in construing the Act. It defines

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PARKER J. the meaning in this way of "sanitary work," "support," and "Sanitary Act." "Sanitary work" is to mean "any existing or future building or work constructed by or vested in or under the control of a local authority under the powers or for the purposes of so much of the principal Act or of any general or local Act or provisional order as relates to the construction or maintenance of any works of sewerage, drainage, sewage disposal, lighting, or water supply, and includes any fixtures, pipes, fittings, or apparatus connected with any such work, or belonging to or used by the local authority." Then the term "support" is to include both "vertical and lateral support," and the expression "Sanitary Act" is to mean "the Act or provisional order under the authority of which a sanitary work has been or is constructed or is maintained, whether such Act or order was passed and confirmed before or after the commencement of this Act."

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It follows, I think, that the sewage works constructed by the corporation on the lands comprised in the conveyance I have mentioned, and also the outfall sewer constructed by it upon other lands also now the property of the plaintiffs, in the manner and under the circumstances I have already described, are sanitary works within the meaning of the Act, and with regard to the outfall sewer it is clear that the Sanitary Act is the Public Health Act of 1875. With regard to the sewage works constructed on the land conveyed, I think the Sanitary Act is either the Public Health Act, 1875, or the earlier statutes repealed by the Public Health Act, 1875, and in part re-enacted or altered. Which is the Sanitary Act will depend, I think, on whether in fact when the works were constructed the Public Health Act of 1875 was in force, or the earlier Acts which the Public Health Act of 1875 superseded.

By s. 3 of the Act of 1883, ss. 18 to 27 of the Waterworks Clauses Act, 1847, with respect to mines are "in relation to any sanitary work of a local authority" to "be deemed to be incorporated with this Act"—that is, the Act of 1883, with which I am dealing—"and with the Sanitary Act under the authority of which such sanitary work has been or is constructed or is maintained," nevertheless with certain modifications specified in various subsections. I think it is clear that this section is meant to have

some retrospective effect, and this is made still clearer by the nature of the modifications referred to in those sub-sections. The concluding words of s. 3 are "The provisions of this Act shall apply to every sanitary work as defined in this Act, whether the land on, in, over, or under which such work is situate is or is not vested in or occupied by the local authority, and is or is not wholly or partially dedicated to the public as a street, highway, or public place." The effect of that section, having regard to the provisions of ss. 18 to 27 of the Waterworks Clauses Act, 1847, is to exclude the principles and doctrines of common law in all cases where such sections are applicable, and to make the rights and liabilities of the local authority and the landowners with respect to mines and rights to support dependent upon what has been referred to as a "mineral code" as distinct from and in contradiction to the principles of the common law. By the code in question, as modified by s. 3 of the Act of 1883, the landowner is bound, before working mines subjacent, and I think also adjacent, to sanitary works, to give certain notices to the local authority, and the local authority thereupon has an option to acquire, or if not actually to acquire, at any rate to take and use within the meaning of the Acts, the minerals within a certain distance of the works in question, and so to obtain support for those works. If the option of the local authority is not exercised, the landowner may work the minerals in the same manner as if the Sanitary Act—I think it would be in this case—had not been passed.

Sect. 4 of the Act of 1883 provides that "Except as in this Act provided, a local authority shall not by reason only of anything contained in the Sanitary Act under the authority of which a sanitary work has been or is constructed or maintained be deemed to have acquired or to be entitled to or to be bound to acquire or make compensation for any right of support for such sanitary work as against any person owning or working or being lessee or occupier of or entitled to work or otherwise interested in any mine; and nothing in such Sanitary Act shall be deemed to have subjected or to subject any such person to any liability to the local authority in respect of damage to a sanitary work caused in or consequent upon the working of any mines in a

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PARKER J. reasonable and proper manner." On that section the question arises whether the words "except in this Act provided" refer to the following section (s. 5), or whether some other meaning is to be put upon them. In my judgment, although they may have some further application, they refer at any rate to the provisions of s. 5, which I shall now have to consider.

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The 5th section of the Act of 1883 is the one upon which the questions at issue in this case really depend. That section enacts as follows: "Nothing in this Act shall be construed to repeal, invalidate, or affect any express enactment in a Sanitary or other Act with respect to rights of support for sanitary works, or any agreement made before the passing of this Act with respect to such rights, or to affect any action, arbitration, or other legal proceedings concluded before or pending at the passing of this Act." It then proceeds: "Where any right of support has been acquired before the passing of this Act by a local authority in respect of any sanitary work, and no compensation is at the passing of this Act recoverable in respect of such right, nothing in this Act shall be construed to apply to the work in respect of which such right has been acquired, or operate to deprive the local authority of such right or to entitle any person to any compensation in respect thereof, to which such person would not have been entitled if this Act had not been passed." It appears to me, therefore, that sanitary works to which the last clause of that section applies are altogether taken out of the Act, and that neither the landowner nor the corporation can rely upon any single section of the Act as governing or in any way being applicable to their rights. In my judgment the corporation had prior to the passing of the Act of 1883 acquired rights of support in respect of its sewage works situate on the lands comprised in the conveyance, and had also, I think, acquired rights of support in respect of the outfall sewer; and I think it is equally clear that no compensation was, at the passing of the Act of 1883, recoverable in respect of the rights which had been so acquired.

With regard to the works which were situate on the land comprised in the conveyance, the compensation had been assessed and paid long before the Act of 1883 came into operation, and

the rights acquired by the conveyance were still in existence, and no compensation could at that time be demanded in respect thereof; and similarly, with regard to the outfall sewer, there had been an arbitration under the provisions of the Public Health Act, 1875, and the umpire had given an award. That award ought, as I have said, to have included compensation for everything which the local authority acquired by the exercise of its powers, and I think, whatever may be the fact as to what the umpire did or did not take into consideration, it is quite clear that, by intendment of law at any rate, it would be considered to have covered everything, and that therefore no further compensation could be possibly demanded in respect of the rights of support which the Act of 1875, according to the decision in *In re Dudley Corporation* (1), inferentially conferred upon the local authority. It follows from this that, reading the words according to their natural and literal meaning, the corporation of Barnsley is within the first words of the 2nd paragraph of s. 5. It had acquired rights of support before the passing of the Act, and in respect of those rights no compensation was at the passing of the Act recoverable, and unless there is reason to give the words some other interpretation I ought to give them their literal and natural interpretation; and it would follow from that that the sanitary works on the land conveyed and the outfall sewer are not within the Act at all, and that no section of the Act, therefore, could apply so as to govern in any way the relative rights of the corporation and the landowners in respect of rights of support.

But it is argued, for various reasons which have been suggested in the course of the argument, that that construction of the Act cannot be the right one. One of those reasons is, I think, applicable only to the outfall sewer. It is said in effect that the corporation cannot be considered to have acquired a right in respect of the outfall sewer because of the provisions of s. 4; but I do not think I can logically apply s. 4 if, without such application, the sewage work in question is taken out of the operation of the Act by s. 5. The question I am considering is whether the sewage work is saved from the operation of the Act, and in

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PARKER J. considering that question I cannot, in order to make the 4th section of the Act apply, construe s. 5 as being subject to s. 4. If that were the meaning of the Act, I should have expected s. 5 to run in this way : "Subject to the provisions of s. 4 where any right has been acquired." The reverse is really the case, for in s. 4 we have words "except as in this Act provided," but in s. 5 there is no similar exception.

The rest of the argument against giving these words what appears to me to be their natural meaning is, in effect, this : It is said that if the meaning of s. 5 is such as to protect the corporation in this particular case, the Act, which was clearly intended to have some retrospective effect, could have no such effect at all, or at any rate no such effect so far as s. 4 is concerned, though it might have some retrospective effect so far as s. 3 is concerned ; and it is said that, if that be the true state of affairs, s. 5 is repugnant to the prior sections of the Act and, being a saving section only, ought, if that is the only meaning which can be attributed to it, to be rejected, or that at any rate, if it be possible, s. 5 ought to be construed in some different manner. It seems to me, however, that if one considers the provisions of the Public Health Act, 1875, it will appear that that argument is not really sound, for, under those provisions, a sanitary authority may lay sewers, without giving any notice at all in that behalf, in, for example, highways ; and, after giving notice in that behalf, it has power to lay sewers in, through or under the lands, or any part of the lands, within its district. Of course, it is bound in all cases to make compensation under s. 308, but that obligation to make compensation does not appear to me, on the true construction of the Public Health Act, to be a condition precedent to exercising the rights, although, no doubt, the giving of the notice is such a condition precedent. It therefore follows, as I have no doubt is often the case, that the corporation, as the local authority, may exercise the power of laying the sewers after giving the proper notice, and the question of compensation may be deferred for years. Supposing, therefore, that a corporation in any particular case has exercised the powers of the Act and has laid sewers, whether they be outfall or otherwise, through

public highways or in the lands of private owners, after giving the proper notices, and at the date of the commencement of the Act of 1883 no compensation has been actually assessed, or paid, that would be a case to which the last paragraph of s. 5 of the Act would be inapplicable, because there would be, at the date of the passing of the Act, compensation recoverable in respect of the exercise of the powers with regard to the sanitary work in question. That shews that there is a large class of cases as to which, notwithstanding the provisions of s. 5, the Act may be retrospective, and it is a class to which the provisions of s. 4 would be applicable. If one considers the provisions of s. 3 as distinct from those contained in s. 4, having regard to the principle laid down in *In re Dudley Corporation* (1) and also to the judgment of Sir George Jessel M.R. in *Roderick v. Aston Local Board* (2), I think it very possible that the true inference from the Act of 1875 is that that Act confers a right of support, not only from the lands immediately subjacent to the sewer which is laid under the Act, but also to support from adjacent lands, whether they belong to the owner of the land in which the sewer is laid or do not belong to him. If that be so, it is perfectly possible that there may be vested in a local authority sanitary works as to which it has a right of support from adjacent lands in respect of which right no compensation has been yet assessed or paid. But, even if it were difficult for me to find or point out a case in which, if the natural meaning were given to the savings in s. 5, the prior part of the Act could act retrospectively, I do not think that I should be justified in ignoring for that reason what seems to me the ordinary natural interpretation of the words and savings in s. 5.

Having regard, therefore, to the decision to which I have come on the latter part of s. 5 of the Act of 1883, it becomes unnecessary for me to consider the precise effect of the former part of that section, viz., that which provides that nothing in the Act is to affect any agreement made before the passing of the Act with respect to rights of support, or any action, arbitration, or other legal proceeding concluded before or pending at the passing of the Act.

(1) 8 Q. B. D. 86.

(2) (1877) 5 Ch. D. 328.

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PARKER J. I will make a declaration that, according to the true construction of s. 5 of the Act and in the events which have happened, the prior sections of the Act have no application to the sewage works and outfall sewer respectively mentioned in the statement of claim.

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Solicitors for plaintiffs: *Andrew, Wood, Purves & Sutton, for Newman & Bond, Barnsley.*

Solicitors for defendants: *Warren, Murton & Miller, for H Horsfield, Town Clerk, Barnsley.*

F. E.

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**ADMINISTRATION**—*Legacies—General or specific—Insufficiency of Assets—Abatement—Legacy in Satisfaction of a Debt—Forgiveness of Debts—Will—Construction.*

A testator gave to the trustees of his daughters' marriage settlement 3000*l.* in satisfaction of his covenant to pay them 1000*l.* He also forgave his children respectively all debts and sums of money which might be due from them to him at his death, and not secured by bond, bill, note, or other security. At the date of his death two of his sons owed him sums not secured as above mentioned. The estate proved to be insufficient for the payment of all the legacies in full. The question having arisen whether the legacy of 3000*l.*, which the legatee had elected to take, and the unsecured debts forgiven to the sons were liable to abate with the other general legacies :—

*Held*, that the principle by which a legacy given in satisfaction of dower was entitled to priority and did not abate was inapplicable to the case of a legacy given in satisfaction of an ascertained debt, and therefore the legacy of 3000*l.*, being a mere bounty, was liable to abatement.

But *held*, that the forgiveness of their debts to the sons amounted to specific legacies which were not liable to abatement. *In re WEDMORE. WEDMORE v. WEDMORE — Kekewich J. 277*

2. — *Real Estate—Devise of mortgaged Estate—Partition Action—Fund in Court representing Rents and Profits—Administration Action—Right of Creditors to attach Fund before Judgment—Administration of Estates Act, 1833 (3 & 4 Will. 4, c. 104).*

The Administration of Estates Act, 1833, which makes the real estate of a deceased person assets for the payment of his debts, whether due on simple contract or on specialty, gives no lien or charge on such real estate until a judgment has been obtained.

Testator, who died in 1876, devised and bequeathed his residuary real and personal estate to three persons in equal shares. At the time of his death he was entitled to certain real estate which he had mortgaged in 1839 to secure the repayment of a certain sum and interest. In 1902 the devisees commenced an action for sale in lieu of partition, and in that action certain sums, representing the rents and profits of the mortgaged property, had been paid into Court. In 1903 judgment in the action was given directing the usual accounts and inquiries, and ordering the property to be sold, which had not, however, yet been done. In 1907 the plaintiffs, in whom the benefit of the mortgage of 1839 was now vested, issued their writ in the present action, suing on behalf of themselves and all other creditors of the testator, against the devisees, claiming (1) administration of the testator's real and personal estate, and (2) that the devisees might be restrained from applying for the transfer and payment to them of the fund in Court to the credit of the partition action, and that such fund might be ordered to be

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transferred to the credit of the present action. No judgment had as yet been obtained in this action.

On an application by the plaintiffs for an interim order in the terms of paragraph 2 of the claim in their writ:—

*Held*, that under the Administration of Estates Act, 1833, neither the corpus nor the rents and profits of the real estate became liable to creditors until a judgment had been obtained, and that, as no judgment had been obtained in the present case, the application must be refused.

*In re Hyatt*, (1888) 38 Ch. D. 609, distinguished. *In re MOON*. HOLMES v. HOLMES  
Warrington J. 304

**3. — Life Interest to Wife “if she shall so long continue my Widow”—Bigamous Marriage—Secondary Meaning of “Widow”—Will—Construction.**

A testator gave all his furniture and household goods and effects at his two residences to his “dear wife Dorothy Josephine Wagstaff,” and, after giving various pecuniary legacies, he devised and bequeathed the residue of his real and personal estate to his said wife and two others upon trust for sale and conversion, and to invest and pay the interest and annual produce thereof to “my said wife during her life, if she shall so long continue my widow, for her own use and benefit, and upon or after her decease or second marriage” to stand possessed of the residuary trust estate, in the events which had happened, upon trust for the plaintiff. The lady whom the testator called his wife, and with whom he went through the ceremony of marriage in 1893, was at that time the wife of A. G. J., to whom she had been married in 1884, and who was still living.

After the testator's death in 1903 the lady confessed to bigamy and was sentenced. The plaintiff claimed to be now entitled to the whole residuary estate:—

*Held*, that the testator meant to use the word “widow” in a secondary sense, and upon the true construction of the will the lady was entitled to a life interest in the residuary estate, unless and until she contracted a marriage subsequent to the death of the testator.

*In re WAGSTAFF*. WAGSTAFF v. JALLAND.  
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A testator by his will directed his trustees out of the proceeds of sale and conversion of his estate, after payment of his debts, and funeral and testamentary expenses, to purchase in the name of his wife a Government annuity of 400*l.* for her life. The wife survived the testator, but died sixteen days later, before the will was proved or any of the debts were paid:—

*Held* (affirming the decision of Swinfen Eady J., [1906] 2 Ch. 648), that the annuity, and the right to take its value in cash instead of the annual payment, vested in the widow on the testator's death, and that therefore her legal personal representatives were entitled to such a sum as would, at the date of the testator's death, have purchased the annuity.

*Dawson v. Hearn*, (1831) 1 Russ. & My. 606, observed upon. *In re ROBBINS*. ROBBINS v. LEGGE — — — — C. A. 8

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**ATTORNEY—GENERAL**—Laches—Delay—London Building Act — — — — 23  
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**BOARD OF EDUCATION**—Consent of—Sale of charity land—“Endowment”—Voluntary contributions — — — — 486  
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**BREWERY COMPANY**—*Debenture Trust Deed* —Mortgaged licensed Premises—Security not yet enforceable—Trustees’ Powers—Power to sell and convert—Investment of Proceeds of Sale—Non-renewal of Licence—Licensing Act, 1904 (4 Edw. 7, c. 23), s. 2—Compensation—Capital Moneys—Applicable as Proceeds of voluntary Sale.

A brewery company assured all its licensed premises to trustees upon the trusts of a debenture trust deed, which was in the usual form, for securing an issue of debenture stock, the premises being held by the trustees on trust to permit the company to hold and enjoy the same and to carry on thereon the business of the company until the security thereby constituted became enforceable (which event had not happened), and then upon the usual trust for sale and conversion. The deed provided by clause 17 that at any time before the security thereby constituted became enforceable the trustees might (inter alia) sell and convert, or concur in selling and converting, all or any of the mortgaged premises in the same manner as they could do if the primary trust for conversion had then arisen; and, by clause 18, that the trustees should hold the capital moneys arising under clause 17 upon trust to lay out the same in (inter alia) the purchase of the licensed premises suitable to be held for the purposes of the company :—

*Held*, that moneys paid under the Licensing Act, 1904, for compensation for the licence of one of the mortgaged premises comprised in the trust deed were capital moneys arising under clause 17 as above set out, and were applicable under the provisions of clause 18.

*Law Guarantee and Trust Society v. Mitcham*

**BREWERY COMPANY**—*continued*.

*and Cheam Brewery Co.*, [1906] 2 Ch. 98, explained.

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— *Allhusen v. Whittell*, (1867) L. R. 4 Eq. 295.  
Followed by *Swinfen Eady J. In re PERKINS* — — — [1907] 2 Ch. 596

— *Alven v. Bond* — (1841) Fl. & K. 196, 213  
Followed and applied by *Swinfen Eady J. NUGENT v. NUGENT* [1907] 2 Ch. 292

— *Anglesey (Marquis of)*, *In re*, [1903] 2 Ch. 727.  
Adopted by *Kekewich J. IDEAL BEDDING COMPANY v. HOLLAND* [1907] 2 Ch. 157

— *Ayr Harbour Trustees v. Oswald*, (1883) 8 App. Cas. 623.  
Principle of, applied by *Neville J. In re SOUTH EASTERN RAILWAY COMPANY AND WIFFIN’S CONTRACT* [1907] 2 Ch. 366

— *Bacon, In re* — (1893) 62 L. J. (Ch.) 445  
Not followed by *Swinfen Eady J. In re PERKINS* — — — [1907] 2 Ch. 596

— *Baile v. Baile* — (1872) L. R. 13 Eq. 497  
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— *Bake v. French* — — — [1907] 1 Ch. 428  
Reported on other points. *See* *BAKE v. FRENCH* (No. 2)  
**Warrington J.** [1907] 2 Ch. 215

— *Batten v. Wedgwood Coal and Iron Co.*, (1884) 28 Ch. D. 317.  
Followed by *Neville J. In re LONDON UNITED BREWERIES, LIMITED.* [1907] 2 Ch. 511

— *Bebb v. Bunney* — (1854) 1 K. & J. 216  
Followed by *Warrington J. In re CRAVEN’S MORTGAGE* [1907] 2 Ch. 448



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- *Beckwith, Ex parte* - [1898] 1 Ch. 324  
Followed by Warrington J. *In re DOVER COALFIELD EXTENSION, LIMITED* [1907] 2 Ch. 76
- *Black v. Williams* [1895] 1 Ch. 408, 421  
Applied by Swinfen Eady J. *BARCLAY & Co. v. POOLE* - [1907] 2 Ch. 284
- *Bolland v. Young* [1904] 2 K. B. 824  
Followed by Kekewich J. *IDEAL BEDDING COMPANY v. HOLLAND* [1907] 2 Ch. 157
- *Boswell, In re. Merritt v. Boswell*, [1906] 2 Ch. 359.  
On appeal, settlement arrived at.  
C. A. [1907] 2 Ch. 331
- *Bullock v. Downes* (1860) 9 H. L. C. 1  
Principle of, applied by C. A. *In re WILSON. WILSON v. BATCHELOR* [1907] 2 Ch. 572
- *Caterham Urban Council v. Godstone Rural Council*, [1904] A. C. 171.  
Referred to by Warrington J. *HOLSWORTHY URBAN COUNCIL v. HOLSWORTHY RURAL COUNCIL* [1907] 2 Ch. 62
- *Cellular Clothing Co. v. Maxton and Murray*, [1899] A. C. 326, 346.  
Principles laid down by Lord Davey in, applied by Parker J. *BRITISH VACUUM CLEANER COMPANY v. NEW VACUUM CLEANER COMPANY* [1907] 2 Ch. 312
- *Clergy Orphan Corporation, In re*, [1894] 3 Ch. 145.  
Explained and distinguished by C. A. *ATTORNEY-GENERAL v. MATHIESON* [1907] 2 Ch. 383  
Followed by Neville J. *In re SOCIETY FOR TRAINING TEACHERS OF THE DEAF AND WHITTLE'S CONTRACT* [1907] 2 Ch. 486
- *Clifford v. Timms* - [1907] 1 Ch. 420  
Reversed by C. A. *HILL v. CLIFFORD. CLIFFORD v. TIMMS. CLIFFORD v. PHILLIPS* - [1907] 2 Ch. 236
- *Colls v. Home and Colonial Stores*, [1904] A. C. 179.  
Explained by Neville J. *ANDREWS v. WAITE* - - [1907] 2 Ch. 500
- *Dawson v. Hearn*, (1831) 1 Russ. & My. 606  
Observed upon by C. A. *In re ROBBINS* [1907] 2 Ch. 8
- *Dixon v. Wrench* (1869) L. R. 4 Ex. 154  
*Quere* whether now the law. Per Kekewich J. in *IDEAL BEDDING COMPANY v. HOLLAND* [1907] 2 Ch. 157
- *Dudley Corporation, In re*, (1881) 8 Q. B. D. 86.  
Referred to by Parker J. *JARY v. BARNSELY CORPORATION* [1907] 2 Ch. 600
- *Elias, In re* - (1851) 3 Mac. & G. 234  
Followed by C. A. *In re DE LARRAGOITI* - - [1907] 2 Ch. 14

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- *Eno v. Dunn* - (1890) 15 App. Cas. 252  
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- *Farquhar v. Hadden*, (1871) L. R. 7 Ch. 1  
Distinguished by Neville J. *In re HOLLAND* - - [1907] 2 Ch. 88
- *Goslings & Sharpe v. Blake*, (1889) 23 Q. B. D. 324.  
Distinguished by Warrington J. *In re CRAVEN'S MORTGAGE* [1907] 2 Ch. 448
- *Grange, In re. Chadwick v. Grange*, [1907] 1 Ch. 313.  
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- *Henry, In re* - - [1907] 1 Ch. 30  
Not followed by Swinfen Eady J. *In re PERKINS* - - [1907] 2 Ch. 596
- *Holmes v. Simmons*, (1868) L. R. 1 P. & M. 523, 529.  
Applied by Swinfen Eady J. *In re RUTTER* - - [1907] 2 Ch. 592
- *Howatson v. Webb* - [1907] 1 Ch. 537  
Distinguished by Swinfen Eady J. *BAGOT v. CHAPMAN* [1907] 2 Ch. 222
- *Hubbuck, In re* - - [1896] 1 Ch. 754  
Applied by Warrington J. *In re LEWIS. DAVIES v. HARRISON* [1907] 2 Ch. 296
- *Hyatt, In re* - (1888) 38 Ch. D. 609  
Distinguished by Warrington J. *In re MOON. HOLMES v. HOLMES* [1907] 2 Ch. 304
- *Johns v. Balfour* - (1889) 1 Megone, 191  
Applied by Kekewich J. *In re KINGSBURY COLLIERIES, LIMITED AND MOORE'S CONTRACT* [1907] 2 Ch. 259
- *Jones, In re* - - [1893] 2 Ch. 461  
Distinguished by Warrington J. *In re DARBY'S ESTATE* - [1907] 2 Ch. 465
- *Jones, In re* - - [1902] 1 Ch. 92  
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- *Ker v. Ker* - (1869) Ir. R. 4 Eq. 15  
Explained and distinguished by Warrington J. *In re DARBY'S ESTATE* [1907] 2 Ch. 465
- *Kibble v. Fairthorne* - [1895] 1 Ch. 219  
Dictum of Romer J. in, not followed by Parker J. *SAMUEL JOHNSON & SONS, LIMITED v. BROCK* [1907] 2 Ch. 533
- *Ladyman v. Grave* (1871) L. R. 6 Ch. 763  
Principle of, not to be extended in one direction. *HYMAN v. VAN DEN BERGH Parker J.* [1907] 2 Ch. 516
- *Lane v. Goodwin* - (1843) 4 Q. B. 361  
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- *Law Guarantee and Trust Society v. Mitcham and Cheam Brewery Co.*, [1906] 2 Ch. 98.  
Explained by Kekewich J. DAWSON v. BRAIME'S TADCASTER BREWERIES, LIMITED - - - [1907] 2 Ch. 359
- *Lloyd's Bank v. Bullock*, [1896] 2 Ch. 192  
Distinguished by Parker J. CAPELL v. WINTER - - - [1907] 2 Ch. 376
- *Lloyd's Banking Co. v. Jones*, (1885) 29 Ch. D. 221  
Followed by Parker J. WALKER v. LINOM - - - [1907] 2 Ch. 104
- *Logan v. Bank of Scotland* (No. 2), [1906] 1 K. B. 141.  
Applied by Warrington J. EGBERT v. SHORT - - - [1907] 2 Ch. 205
- *Mayhew v. Mayhew*- (1812) 2 Phillim. 11  
Applied by Swinfen Eady J. *In re RUTTER* - - - [1907] 2 Ch. 592
- *Noakes v. Noakes & Co.* [1907] 1 Ch. 64  
Approved by Kekewich J. DAWSON v. BRAIME'S TADCASTER BREWERIES, LIMITED - - - [1907] 2 Ch. 359
- *Patching v. Barnett*, (1881) 51 L. J. (Ch.) 74; [1907] 2 Ch. 154, n.  
Discussed and followed by Kekewich J. *In re Betts*. DOUGHTY v. WALKER [1907] 2 Ch. 149
- *Piers' Estate, In re*, (1863) 14 Ir. Ch. Rep. 452.  
Adopted by Kekewich J. WHITMORE-SEARLE v. WHITMORE-SEARLE [1907] 2 Ch. 332
- *Pontifex v. Farnham*, (1893) 41 W. R. 238  
Doubted by Warrington J. BAKE v. FRENCH (No. 2)- - [1907] 2 Ch. 215
- *Prowse v. Spurway*, (1877) 46 L. J. (P. D. & A.) 49.  
Applied by Swinfen Eady J. *In re RUTTER* - - - [1907] 2 Ch. 592
- *Reddaway v. Banham* - [1896] A. C. 199  
Distinguished by Parker J. BRITISH VACUUM CLEANER COMPANY v. NEW VACUUM CLEANER COMPANY • [1907] 2 Ch. 312
- *Robbins, In re. Robbins v. Legge*, [1906] 2 Ch. 648.  
Affirmed by C. A. - [1907] 2 Ch. 8
- *Scott v. Pape* - - (1886) 31 Ch. D. 554  
Followed by Neville J. ANDREWS v. WAITE - - - [1907] 2 Ch. 500
- *Shelley's Case*- - (1579) 1 Rep. 93b  
Referred to by Kekewich J. *In re BUCKTON* - - - [1907] 2 Ch. 406
- *Shepherd v. Bray*- - [1906] 2 Ch. 235  
Settlement arrived at.  
C. A. [1907] 2 Ch. 571
- *Simper v. Foley* - (1862) 2 J. & H. 555  
Principle of, not to be extended in one direction. HYMAN v. VAN DEN BERGH Parker J. [1907] 2 Ch. 516

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- *Smith, In re* - - - [1902] 2 Ch. 667  
Distinguished and discussed by Kekewich J. *In re ANSON'S SETTLEMENT* [1907] 2 Ch. 424
- *South Western Loan and Discount Co. v. Robertson*, (1881) 8 Q. B. D. 17.  
Followed by Kekewich J. IDEAL BEDDING COMPANY v. HOLLAND [1907] 2 Ch. 157
- *Stockport Ragged, Industrial and Reformatory Schools, In re*, [1898] 2 Ch. 687, 697.  
The difficulty suggested by Lindley M.R. in, discussed by Neville J. *In re SOCIETY FOR TRAINING TEACHERS OF THE DEAF AND WHITTLE'S CONTRACT* [1907] 2 Ch. 486
- *Tusker (W.) & Sons, Ltd., In re*, [1905] 2 Ch. 587.  
Followed by C. A. *In re RUSSIAN PETROLEUM AND LIQUID FUEL COMPANY* - - - [1907] 2 Ch. 540
- *Thellusson v. Valentia (Viscount)*, [1906] 1 Ch. 480. Affirmed by C. A. [1907] 2 Ch. 1
- *Trustees, Executors, and Agency Co. v. Short*, (1888) 13 App. Cas. 793.  
Explained by Parker J. SAMUEL JOHNSON & SONS, LIMITED v. BROCK [1907] 2 Ch. 533
- *Turner, In re. Wood v. Turner*, [1907] 2 Ch. 127.  
The order in this action, as ultimately entered: See *In re TURNER. WOOD v. TURNER* - C. A. [1907] 3 Ch. 539
- *Tussaud v. Tussaud*, (1890) 44 Ch. D. 678.  
Observed upon by Joyce J. FINE COTTON SPINNERS AND DOUBLERS' ASSOCIATION, LIMITED, AND JOHN CASH & SONS, LIMITED v. HARWOOD, CASH & Co., LIMITED [1907] 2 Ch. 184
- *Tyrrell v. Painton* - [1895] 1 Q. B. 202  
Followed by Kekewich J. IDEAL BEDDING COMPANY v. HOLLAND [1907] 2 Ch. 157
- *Wilson, In re. Wilson v. Batchelor*, [1907] 1 Ch. 450.  
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- CERTIFICATE**—Company—Debentures—Registration—Certificate of registrar—Conclusiveness of certificate - - - 471  
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- CHARGING ORDER**—Judgment creditor—Post-nuptial settlement—Appointment of receiver—Equitable execution—Injunction—Settlement set aside - 157  
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- Property "preserved"—Costs of plaintiff's solicitors—Costs of trustees—Priority See SOLICITOR. 2. 126, 539

**CHARITY** — *Endowment* — *Consent of Charity Commissioners* — *Voluntary Subscriptions* — *Mixed Charity* — *Foundation Deed* — *Implied Authority to settle Trusts* — *Investment in Land* — *Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), ss. 62, 66* — *Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 29.*

Where a charity is supported by voluntary subscriptions and donations given for the general purposes of the charity, the individual or committee entrusted with the money must, in the absence of evidence to the contrary, be deemed to have implied authority for or on behalf of the donors to declare by deed the trusts to which the sums contributed are to be subject; this deed, until set aside or rectified by the Attorney-General, must be treated as decisive of the trusts which by the authority of the donors are to regulate the charity.

If, by reason of a deed of this character, it is no longer competent for the governing body to apply as income any real or personal property of the charity, that "investment" is not exempt from the jurisdiction of the Charity Commissioners.

A charity cannot be said to be "wholly maintained by voluntary contributions" if it has freehold premises used for the purposes of the charity, and the fact that this freehold produces no actual income is immaterial.

*In re Clergy Orphan Corporation, [1894] 3 Ch. 145, explained and distinguished.*

Decision of Kekewich J. reversed. ATTORNEY-GENERAL *v.* MATHIESON — **C. A. 383**

**2.** — "*Endowment*" — *Incorporated Educational Society* — *Voluntary Contributions* — *Scholars' Fees* — *Sale of Charity Land* — *Consent of Board of Education* — *Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), ss. 62, 66* — *Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), ss. 29, 48* — *Board of Education Act, 1899 (62 & 63 Vict. c. 33), s. 2.*

In 1886 a society incorporated under s. 23 of the Companies Act, 1867, with the object (*inter alia*) of teaching and training teachers for deaf mutes, and of providing schools and colleges for that purpose, acquired freehold property which it used as a training college for its purposes. The purchase-money for the property was paid partly by voluntary contributions and partly by the proceeds of a bazaar organized for the purpose. The society being an educational charity, the jurisdiction of the Charity Commissioners (if any) with respect to it became, under certain statutory provisions, vested in the Board of Education. The society, apart from the property so acquired, had no endowment, and was entirely supported by—(1.) voluntary contributions; (2.) payments by or on behalf of scholars; (3.) grants from the Board of Education; and (4.) grants from school boards out of local rates. In 1907 the society contracted to sell the property:—

*Held*, that the property, having been purchased with moneys applicable to the general purposes of the society, was not an endowment, and that the society could sell it without the consent of the Board of Education.

*In re Clergy Orphan Corporation, [1894] 3 Ch. 145, followed.*

**CHARITY**—*continued.*

*Held*, also, that the society was "wholly maintained by voluntary contributions" within the meaning of s. 62 of the Charitable Trusts Act, 1853, notwithstanding that its sources of income included the items (2.), (3.), and (4.) above mentioned.

The difficulty suggested by Lindley M.R. in *In re Stockport Ragged, Industrial and Reformatory Schools, [1898] 2 Ch. 687, 699*, discussed. *In re SOCIETY FOR TRAINING TEACHERS OF THE DEAF AND WHITTLE'S CONTRACT*

Neville J. 486

**CHILD.**

*See* under **INFANT.**

**CLASS**—Next of kin according to the statute—Time for ascertaining class— — **572**  
*See* **WILL. 3.**

**CLUB** — *Rules* — *Power to alter* — *Fundamental Objects* — *General Meeting* — *Resolution* — *Validity.*

The H. Club was formed in 1868 with express powers to alter any of its rules by the resolution of a prescribed majority. The rules were accordingly altered from time to time, and the subsisting rule 2 read thus: "The club is instituted for the purpose of providing a ground for pigeon-shooting, polo, and other sports surrounded with such accessories and so situated as to render it an agreeable country resort." Pigeon-shooting had been carried on at the club from its commencement down to 1905, prizes being given and competitions arranged by the committee. Polo and other sports had also been carried on for a shorter period. At a general meeting of the club held in May, 1905, a resolution was passed by the requisite majority that as from December 31, 1905, pigeon-shooting should be discontinued at the club. The minority brought an action against the trustees and committee for a declaration that the resolution was null and void, on the ground that it was not competent to the majority, under the guise of altering the rules of the club, to change its fundamental object:—

*Held* (affirming the decision of Joyce J., [1906] 1 Ch. 480), that no one of the objects in rule 2 was more a fundamental object of the club, in the sense that it could not be varied or excluded, than any other mentioned in that rule; that what had been done was within the power of altering the rules; and that consequently no such declaration as was asked for ought to be made. *THELLUSSON v. VISCOUNT VALENTIA*

**C. A. 1**

**COMMITTEE**—Lunatic.

*See* under **LUNACY.**

**COMPANY**—*Debenture-holders' Action*—*Receiver and Manager* — *Insufficient Estate* — *Costs* — *Priorities*—*Bankruptcy of Receiver.*

Where a receiver and manager appointed by the Court properly incurs debts in carrying on the business, the Court will see that such debts are satisfied, either by the receiver, or, if the receiver becomes bankrupt or there is any other reason which makes it advisable, by payment



**COMPANY—continued.**

direct to the creditors of the business out of the funds in Court available for that purpose.

In a debenture-holders' action a receiver and manager was appointed. The receiver, in carrying on the business of the company, incurred considerable debts without the leave of the Court or the consent of the debenture-holders, and subsequently became bankrupt. The funds in Court were the only assets of the company, and were insufficient to discharge the plaintiffs' costs of realization and the receiver's costs of carrying on the business. The trustee in bankruptcy of the receiver claimed that the funds in Court, less the costs of realization, ought to be paid out to him for distribution amongst the receivership creditors, whilst the plaintiffs contended that the receiver, having acted improperly, was not entitled to be indemnified out of the assets, and that the funds, less costs of realization, ought to be paid to the debenture-holders:—

*Held* (following *Batten v. Wedgwood Coal and Iron Co.*, (1884) 28 Ch. D. 317), that the funds in Court must be applied, first, in payment of the costs of realization; secondly, in payment of the receiver's costs.

*Held*, also, that the trustee in bankruptcy was not entitled to have the balance of the funds, after payment of costs of realization, paid out to him, but that the Court would distribute such balance subject to an inquiry whether any and what debts had been properly incurred by the receiver in carrying on the business. *In re LONDON UNITED BREWERIES, LIMITED. SMITH v. LONDON UNITED BREWERIES, LIMITED*

**Neville J. 511**

**2. — Debentures — *Pari passu* Incumbrancers — Deposit of Debentures to secure pecuniary Assistance — Loan — Repayment of Money advanced — Debentures not returned to the Company — Extinction of Debentures — Further Loan — Keeping Debentures alive — Power to re-charge — Re-issue — Current Account.**

A company issued a series of debentures as floating securities on the terms that they should not without the authority of the debenture-holders create any charge on the mortgaged assets ranking *pari passu* with or in priority to the charge created by the debentures. They deposited 100,000*l.* of these debentures with a bank as collateral security for a credit of 150,000*l.*, by the terms of which the bank were to accept the company's drafts. This credit was not a current account, nor was anything advanced which was strictly speaking a loan. After this arrangement had been in operation for some time the amount due to the bank on the credit was paid off by the company. Immediately before this repayment the bank advanced 500*l.* to the company in order to avoid the deposited debentures being freed from all charges in favour of the bank; and the debentures were not given back to the company. The other debenture-holders claimed that the deposited debentures were dead, and could not be re-charged with the 500*l.* or any other sum:—

*Held* that, inasmuch as the whole amount for which the debentures were originally deposited

**COMPANY—continued.**

as security had been paid off, the debentures themselves were spent, notwithstanding that they had not been handed back to the company, and that they could not be re-charged with the 500*l.* or any further sum.

*In re W. Tasker & Sons, Ltd.*, [1905] 2 Ch. 587, followed.

*Quære*, whether such a re-charge would be authorized by an article which gave power to the board to create, issue, make and give debentures for the purpose of borrowing money or for any other purpose.

*Per Warrington J.*: The rule that if debentures are issued and deposited as security, and the amount nominally secured by them is advanced on that security and is then paid off, no further charge on them can be created without creating an additional charge which purports to rank *pari passu* with the debentures of the original issue, applies to a current account. *In re RUSSIAN PETROLEUM AND LIQUID FUEL COMPANY, LIMITED. LONDON INVESTMENT TRUST, LIMITED v. RUSSIAN PETROLEUM AND LIQUID FUEL COMPANY, LIMITED* — **C. A. 540**

**3. — Debentures — Registration — Certificate of Registrar — Conclusiveness of Certificate — Companies Act, 1900 (63 & 64 Vict. c. 48), s. 14.**

The certificate of the Registrar of Joint Stock Companies under s. 14 of the Companies Act, 1900, is conclusive evidence that all the requirements of the section as to the registration of debentures have been complied with, and where such a certificate has been granted the Court will refuse to go into the question whether such requirements have in fact been complied with, as, for example, whether the debenture-holders of the series registered do in fact rank *pari passu*.

*In re YOLLAND, HUSSON & BIRKETT, LIMITED. LEICESTER v. YOLLAND, HUSSON & BIRKETT, LIMITED* — **Warrington J. 471**

**4. — Director — Appointment of Limited Company — Ultra Vires — Winding-up — Alteration of Constitution of Company — "Just and Equitable" — Companies Act, 1862 (25 & 26 Vict. c. 89), s. 79, sub-s. 5.**

A company registered under the Companies Act, 1862, need not have any directors, and there is nothing in the Companies Acts prohibiting the appointment of a limited company as a director or manager of another company.

*In re BULAWAYO MARKET AND OFFICES COMPANY, LIMITED* — **Warrington J. 458**

**5. — Director — Managing Director — "Vacating Office" — Resignation — Withdrawal before Acceptance — Articles — Construction.**

A director of a limited liability company can, subject to the articles of the company, resign his office on giving a proper notice to the company, and such notice when once given cannot be withdrawn without the consent of the company.

The articles of a limited liability company provided (article 84) that the office of a director should be vacated (*inter alia*) if by notice in writing to the company he resigned his office, provided that the vacation of office should not



**COMPANY—continued.**

take effect unless the directors should pass a resolution to the effect that he had vacated his office, such resolution to be passed within six months from the happening of the event whereby such director had vacated his office; and (article 85) that the office of a managing director should be vacated upon the happening of any of the contingencies mentioned in article 84 whereby the office of a director should be vacated. A managing director of the company wrote to the company resigning his office of managing director, but, before the next meeting of the board, he wrote again to the company absolutely withdrawing his resignation. At the next meeting of the board a resolution was passed that the managing director had vacated his office:—

*Held*, that the whole of article 84, including the proviso therein, was imported into article 85; that the managing director could not withdraw his resignation without the consent of the company; that by his letter of resignation he vacated his office; and that the resolution of the board was effective and valid. **GLOSSOP v. GLOSSOP**

**Neville J. 370**

**6. — Director's Remuneration — Purchase by Company of Shares in another Company — Director of purchasing Company appointed Director of selling Company — Qualification provided by purchasing Company — Liability of Director to account for Remuneration received — Companies — Winding-up.**

Remuneration paid by a company under powers in its articles of association to a director is not profit derived from the use of his qualification shares, but payment for work done by him under his contract with the company.

Where, therefore, qualification shares are held by a director as a trustee, he is under no obligation to account to his *cestui que trust* for the remuneration received by him for acting as director.

In June, 1901, the D. Company purchased 5105 shares in the K. Corporation, which were transferred into the names of the chairman and secretary of the D. Company as trustees for that company. On February 11, 1902, C., a director of the D. Company, was elected a director of the K. Corporation in order that he might look after the interests of the D. Company in the affairs of the K. Corporation. The articles of association of the K. Corporation provided that the qualification of a director should be the holding of shares in the corporation of the nominal amount of 1000*l.*, and that a director might act before acquiring his qualification. On February 28, 1902, the directors of the D. Company resolved that 1000 of the 5105 shares of the K. Corporation belonging to the company should be transferred to C. to provide his qualification as a director of the K. Corporation. The shares were accordingly transferred to C., who thereupon executed a declaration of trust of them in favour of the D. Company. C. acted as director of the K. Corporation, and continued to hold the 1000 shares which he had thus acquired until February 26, 1903, when he re-transferred them. On March 31, 1903, the company was ordered to be wound up. \*

**COMPANY—continued.**

On an application by the liquidator of the D. Company for payment to him of the remuneration received by C. for acting as director of the K. Corporation:—

*Held*, that the remuneration was received by C. for work done by him as director of the K. Corporation, and was not profit received by him from the use of the D. Company's shares in the K. Corporation, and that he was therefore under no liability to account for the remuneration to the liquidator of the D. Company.

*Ex parte Beckwith*, [1898] 1 Ch. 324, followed. *In re DOVER COALFIELD EXTENSION, LIMITED* — — — **Warrington J. 76**

**7. — Prospectus — Untrue Statement — Action by Shareholders against some of the Directors — Compensation paid by Defendants — Contributions from Co-directors — Evidence — Liability of Estate of Deceased Director — Costs — Directors' Liability Act, 1890 (53 & 54 Vict. c. 61), ss. 3, 5.**

Appeal from a decision of Warrington J., [1906] 2 Ch. 235. Settlement arrived at on terms set out. **SHEPHEARD v. BRAY C. A. 571**

**8. — Winding-up — Voluntary Liquidator — Officer of the Company — Duty to stamp and file Contracts with respect to Shares issued for a Consideration other than Cash — Companies Act, 1900 (63 & 64 Vict. c. 48), s. 7.**

A liquidator in the voluntary winding-up of a company is an officer of the company within the meaning of s. 7 of the Companies Act, 1900, and it is, therefore, his duty to pay out of the assets of the company the stamp duty in respect of any unfilled contract constituting the title of an allottee of shares allotted for a consideration other than cash, and to file the contract when duly stamped.

Form of order on application for directions. *In re X. COMPANY, LIMITED* — **Parker J. 92**

— Brewery company—Debenture trust deed — Mortgaged licensed premises — Security not yet enforceable—Trustees' powers — — — — — **359**  
*See BREWERY COMPANY.*

— Name—Descriptive of article and process used—Similarity of name—Injunction —Registered name — — — — **312**  
*See TRADE NAME. 2.*

— Name, Similarity of—Deception—Right of individual to use his own name—Transfer to company — — — — **184**  
*See TRADE NAME. 1.*

— Power to acquire land—No express power of sale—Constitution of company—Implied power — — — — **259**  
*See VENDOR AND PURCHASER. 1.*

— Trustees — Unauthorized investments — Shares in company—Substitution of shares in different companies — — **424**  
*See TRUSTEE.*

**COMPENSATION** — Licensing Acts — Non-renewal of licence—Capital moneys — Applicable as proceeds of voluntary sale  
*See* BREWERY COMPANY - 359

**COMPROMISE** — Costs of trustees — Trustees' right of indemnity—Priority 126, 539  
*See* SOLICITOR. 2.

— Creation of urban district — Subtraction of parish from rural district - - 62  
*See* LOCAL GOVERNMENT.

**CONDITION** — Lease — Licence to assign — Unreasonably withheld — Condition imposing increased rent - - 229  
*See* LANDLORD AND TENANT. 1.

**CONSENT**—Charity Commissioners—Foundation deed — Implied authority to settle trusts—Investment in land - 383  
*See* CHARITY. 1.

— “Consent or agreement”—Light—Enjoyment - - - - 516  
*See* LIGHT. 2.

**CONTRIBUTION**—Directors — Prospectus — Untrue statement—Liability of estate of deceased director—Costs - - 571  
*See* COMPANY. 7.

— Mortgage—Voluntary assignment of part of property comprised in mortgage—Liability of assignee to contribute 465  
*See* MORTGAGE. 4.

**CONVERSION**—Power to postpone—Tenant for life and remainderman — Mortgage deferring payment of interest - 296  
*See* WILL. 2.

— Sale by mortgagee—Surplus proceeds of sale—Realty or personality—Lunacy of mortgagor - - - - 20  
*See* MORTGAGE. 3.

**CONVEYANCE**—Fraudulent.  
*See* under FRAUDULENT CONVEYANCE.

**CONVEYANCING AND LAW OF PROPERTY**—Lease—Licence to assign—Unreasonably withheld — Condition imposing increased rent - - - 229  
*See* LANDLORD AND TENANT. 1.

— Mortgage—Priority—Fictitious sale by trustee for sale—Conveyance containing receipt for money never paid - 376  
*See* MORTGAGE. 1.

**COSTS** — Administration — “Testamentary expenses” - - - 149, 154, n.  
*See* PRACTICE. 2, 3.

— Charging order—Costs of plaintiff's solicitors—Costs of trustees—Priority 126, 539  
*See* SOLICITOR. 2.

— Debenture-holders' action—Receiver and manager—Insufficient estate—Costs—Priorities—Bankruptcy of receiver 511  
*See* COMPANY. 1.

**COSTS**—*continued.*

— Lease—Licence to assign—Unreasonably withheld — Conditions imposing increased rent - - - 229  
*See* LANDLORD AND TENANT. 1.

— Public authorities protection—Creation of urban district—Subtraction of parish from rural district - - - 62  
*See* LOCAL GOVERNMENT.

— *Shelley's Case*, Rule in—Costs—Practice—Adjourned summonses—Uniformity 406  
*See* WILL. 5.

— Solicitor.  
*See* under SOLICITOR.

— Trade mark—Registration—Discretion of registrar—Assignment—Costs of registrar - - - - 396  
*See* TRADE MARK. 2.

— Trustees.  
*See* under TRUSTEE.

**COVENANT**—Costs — Taxation — Lease — Covenant for renewal—Costs of investigating lessee's title - - - - 54  
*See* SOLICITOR. 3.

— Lease by mortgagee “as agent”—Covenant running with land - - - 97  
*See* LANDLORD AND TENANT. 3.

— Railway company—Conveyance subject to restrictive covenant—Resale of part of land not required—Validity of covenant—Ultra vires - - - - 366  
*See* VENDOR AND PURCHASER. 2.

**CREDITORS**—Partition action—Fund in Court representing rents and profits — Administration action — Right of creditors to attach fund before judgment - - - - 304  
*See* ADMINISTRATION. 2.

**CURATOR**—Lunatic out of the jurisdiction—Foreign curator—English stocks and shares—Transfer—Discretion of judge in lunacy - - - - 14  
*See* LUNACY. 2.

**DEATH**—Annuitant before probate, Death of—Right to value of annuity - - - 8  
*See* ANNUITY.

— Lunatic—Subsequent receipts—Surety—Liability—Committee and receiver—Default—Accounts - - - 120  
*See* LUNACY. 1.

— Presumption of death without issue—Evidence—Sufficiency—Practice - 354  
*See* EVIDENCE. 2.

**DEBENTURE-HOLDERS AND DEBENTURES**—Company  
*See* under COMPANY.

**DEBENTURES**—Brewery company—Debenture trust deed—Mortgaged licensed premises—Security not yet enforceable—Trustees' powers - - - 359  
See BREWERY COMPANY.

**DEBT**—Legacy in satisfaction of a debt—Forgiveness of debts—Will—Legacies—General or specific—Insufficiency of assets—Abatement - - - 277  
See ADMINISTRATION. 1.

— Mortgage debt.  
See under MORTGAGE.

**DECLARATORY JUDGMENT**—Costs—Lease—Licence to assign—Unreasonably withheld—Condition imposing increased rent - - - 229  
See LANDLORD AND TENANT. 1.

**DEED**—*Misrepresentation as to Character of Deed*—*Plea of Non est factum*—*Validity*—*Plea Good as to Part of Deed*.

A married woman entitled to a reversionary interest was induced by her husband to execute a document which he represented to be a power of attorney enabling him to raise money at some future time. It was in fact a mortgage of a reversionary interest to which she was entitled for 12,000*l.* containing a personal covenant for payment by the wife. The wife knew that if her husband did eventually raise money under the document it would be raised out of her reversionary interest. She did not intend to create a present charge or incur any personal liability. The mortgagees brought this action against the husband and wife for foreclosure and judgment in their covenants. The wife pleaded, among other defences, "*non est factum*":—

*Held*, that the husband's misrepresentation was as to the nature and character of the deed, and the plea was good as to the whole deed, and that, even if the charge on the wife's reversionary interest were valid, the defence ought to prevail as to her covenant to pay principal and interest.

*Howatson v. Webb*, [1907] 1 Ch. 537, distinguished. *BAGOT v. CHAPMAN*

Swinfen Eady J. 222

**DEEDS**—Trustee's negligence—Omission to get possession of title-deeds - - - 104  
See MORTGAGE. 2.

**DELAY**—Attorney-General—Laches—London Building Act - - - 23  
See LONDON.

**DENTIST**—Report of Dental Committee—Partnership—Construction of articles—"Professional misconduct" - - - 236  
See EVIDENCE. 1.

**DIRECTOR**—Appointment of limited company—Ultra vires—Winding-up - - - 458  
See COMPANY. 4.

— Managing director—"Vacating office"—Resignation—Withdrawal before acceptance—Articles—Construction 370  
See COMPANY. 5.

**DIRECTOR**—*continued*.

— Prospectus—Untrue statement—Liability of estate of deceased director—Costs  
See COMPANY. 7. 571

— Remuneration, Director's—Director of purchasing company appointed director of selling company—Company—Winding-up - - - 76  
See COMPANY. 6.

**DISCRETION**—Trade Mark—Registration—Discretion of registrar—Costs - - - 396  
See TRADE MARK. 2.

**DISENTAILING ASSURANCE**—Execution by tenant in tail—Death of tenant in tail—Subsequent execution by protector signifying his consent—Inrolment 332  
See ESTATE TAIL.

**DISTRIBUTIONS, STATUTE OF**—Executor—Express trust of residue—Partial failure of beneficial interest—Next-of-kin 84  
See WILL. 1.

**DRAINAGE**—New system—Capital money—Improvements—Tenant for life and remainderman - - - 340  
See SETTLED LAND. 2.

**DRAINS**.  
See under SEWERS.

**EASEMENT**—Light.  
See under LIGHT.

**EDUCATION**—Board of Education, Consent of—Sale of charity land—"Endowment"—Voluntary contributions - - - 486  
See CHARITY. 2.

— Ward of Court—Guardian—Religion of father—Religious education, Change of—Discretion of Court - - - 557  
See INFANT.

**ENDOWMENT**—Charity.  
See under CHARITY.

**ENGINE-HOUSE**—Tenant for life and remainderman—Capital money—Improvements - - - 340  
See SETTLED LAND. 2.

"**EN VENTRE SA MÈRE**"—Infant—Gifts to persons "born" previously to date of will - - - 46  
See WILL. 6.

**EQUITABLE EXECUTION**—Judgment creditor—Charging order—Appointment of receiver - - - 157  
See FRAUDULENT CONVEYANCE.

**ESTATE TAIL**—*Disentailing Assurance*—*Execution by Tenant in Tail*—*Death of Tenant in Tail*—*Subsequent Execution by Protector signifying his Consent*—*Inrolment*—*Fines and*



**ESTATE TAIL—continued.**

*Recoveries Act, 1833 (3 & 4 Will. 4, c. 74), ss. 15, 40, 42.*

A tenant in tail executed a disentailing assurance and died. The protector of the settlement subsequently signified his consent by executing the assurance, and the same was then duly inrolled within six months from the execution thereof by the tenant in tail:—

*Held*, that the consent of the protector was effectively given notwithstanding the previous execution of the assurance by, and the death of, the tenant in tail, and that the inrolment after the tenant in tail's death was good.

*In re Piers' Estate*, (1863) 14 Ir. Ch. Rep. 452, adopted. *WHITMORE-SEARLE v. WHITMORE-SEARLE*. **Kekewich J. 332**

— Will—Construction—*Shelley's Case*, Rule in—Gift to a person for life and then "to his sons and their sons in succession" — — — — **406**  
See *WILL*. 5.

**EVIDENCE—Admissibility—Judgment in rem—Order of General Medical Council erasing Name from Dentists' Register—Report of Dental Committee—Partnership—Construction of Articles—"Professional Misconduct"—Dentist—Dentists Act, 1871 (41 & 42 Vict. c. 33), ss. 13, 14, 15.**

Three several articles of partnership for carrying on the business of dentist, entered into by two persons named Clifford with the plaintiff in the first action and the defendants in the other two actions, all contained a provision that if either partner should be guilty of "professional misconduct" the other partner should be at liberty to give notice in writing determining the partnership. On May 24, 1906, the General Medical Council, acting under the powers of the Dentists Act, 1878, made an order directing the registrar to strike the Cliffords' names off the Register of Dentists, on the ground that they had been guilty of conduct "which was infamous or disgraceful in a professional respect" within the words of the Act. The plaintiff in the first action and the defendants in the other two actions thereupon gave notices determining the partnership. These three actions were brought to determine the validity of the notices. The order of the Medical Council was tendered in evidence. Warrington J. rejected it, and decided all three actions in favour of the Cliffords (see *Clifford v. Timms*, [1907] 1 Ch. 420):—

*Held* by the Master of the Rolls and Buckley L.J., that the order was admissible as prima facie evidence of the fact that the Cliffords were guilty of acts "infamous or disgraceful in a professional sense," and there being no rebutting evidence, that fact was proved.

*Held* by the President, that the order was admissible as evidence and conclusive evidence of the fact that the defendants' names had been erased from the register by order of the council, and might be admissible against the defendants for some purposes other than the truth of the fact of misconduct to shew the grounds upon which it was made, and that there was other sufficient evidence that the Cliffords had been guilty of professional misconduct.

**EVIDENCE—continued.**

*Held* by all three judges, that no distinction could be drawn between "professional misconduct" in the deeds and "conduct infamous or disgraceful in a professional respect" in the Act, and that all three appeals must be allowed. *HILL v. CLIFFORD*. *CLIFFORD v. TIMMS*. *CLIFFORD v. PHILLIPS* — — **C. A. 236**

**2. — Presumption of Death without Issue—Evidence—Sufficiency—Practice.**

There is no presumption of the death of a person without issue; it is a matter to be proved by sufficient evidence. *In re JACKSON*. *JACKSON v. WARD* — — **Kekewich J. 354**

**EXECUTION—Disentailing assurance—Execution by tenant in tail—Death of tenant in tail—Subsequent execution by protector signifying his consent—Inrolment — — — — 332**  
See *ESTATE TAIL*.

**EXECUTOR—Express trust of residue—Partial failure of beneficial interest—Next-of-kin — — — — 84**  
See *WILL*. 1.

— Payment of mortgage debt by executors—Liability of assignee to contribute **465**  
See *MORTGAGE*. 4.

— Trustee.  
See under *TRUSTEE*.

**FINAL ORDER—Interlocutory or—Appeal—Leave—Solicitor and client—Costs—Taxation—Summons to review—Refusal — — — — 145**  
See *PRACTICE*. 1.

**FINES AND RECOVERIES—Disentailing assurance—Execution by tenant in tail—Death of tenant in tail—Subsequent execution by protector signifying his consent—Inrolment — — — — 332**  
See *ESTATE TAIL*.

**FIRE HYDRANTS AND HOSE—Capital money—Improvements—Irish estates—Principal mansion-house—Water supply**  
See *SETTLED LAND*. 3. **417**

**FOREIGN CURATOR—English stocks and shares—Transfer—Discretion of judge in lunacy — — — — 14**  
See *LUNACY*. 2.

**FRAUD—Trustee's negligence—Omission to get possession of title-deeds—Priority 104**  
See *MORTGAGE*. 2.

**FRAUDULENT CONVEYANCE—Post-nuptial Settlement—Intention to "delay, hinder, or defraud Creditors"—13 Eliz. c. 5—Equitable Reversionary Interest in Personal Estate—Stocks and Shares—Judgment Creditor—Charging Order—Judgments Act, 1838 (1 & 2 Vict. c. 110), s. 14—Appointment of Receiver—Equitable Execution—Injunction—Settlement set Aside**



**FRAUDULENT CONVEYANCE—continued.**

—*Honest Trustee—Costs out of the Settled Fund*  
—*Possibility of Surplus—Form of Order.*

A voluntary settlement in favour of his wife and child by an insolvent settlor of his equitable reversionary interest in personal estate comprising stocks and shares not subject to an imperative trust for sale:—

*Held* void, under 13 Eliz. c. 5, as against the creditors of the settlor, on the ground that it "delayed, hindered, or defrauded" the plaintiffs, who were judgment creditors suing on behalf of themselves and all other creditors, from obtaining either—

(1.) A charging order upon the stocks and shares under s. 14 of the Judgments Act, 1838.

*South Western Loan and Discount Co. v. Robertson*, (1881) 8 Q. B. D. 17, and *Bolland v. Young*, [1904] 2 K. B. 824, followed.

*Quære* whether *Dixon v. Wrench*, (1869) L. R. 4 Ex. 154, is now law.

Or, (2.) The advantage of the appointment of a receiver, by way of equitable execution, of the debtor's reversionary interest, which would have operated as an injunction to restrain the debtor from himself receiving the property.

*Tyrrrell v. Painton*, [1895] 1 Q. B. 202, followed.

*Semble*, that, having appointed a receiver at the instance of the judgment creditor, the Court would not stop short of granting whatever injunction was necessary to prevent the debtor's property from being received by his assignee to the prejudice of the judgment creditor.

*In re Marquis of Anglesey*, [1903] 2 Ch. 727, adopted.

The trustee, who, with knowledge of the settlor's destitution, prepared the settlement in question, but who acted in good faith and afterwards appeared at the trial to defend the settlement:—

*Held* entitled to his costs out of the settled property.

Where there is any possibility of a surplus after payment of the creditors, the proper form of order after declaring the settlement void as against them is, not to direct the settlement to be delivered up to be cancelled, but to direct the trustees to join and concur in all acts and things necessary for making the property comprised in the settlement available for satisfying the claims of the creditors. *IDEAL BEDDING COMPANY, LIMITED v. HOLLAND* — **Kekewich J. 157**

**GUARDIAN**—Infant—Ward of Court—Religious education, Change of—Religion of father—Discretion of Court — — **557**  
*See* **INFANT**.

**HOTCHPOT**—Advancements to children by testator — — — — **84**  
*See* **WILL**. 1.

**HUSBAND AND WIFE**—*Intestacy of Husband*—*Widow—Contingent Reversionary Interest—Real and Personal Estate—Intestates' Estates Act*, 1890 (53 & 54 Vict. c. 29), ss. 1, 5, 6.

An intestate, who left a widow but no issue,

**HUSBAND AND WIFE—continued.**

was at the date of his death in 1894 entitled to a contingent reversionary interest in certain real and personal property. With the exception of assets to the value of 10*l.* this interest comprised his whole property. It was of no market value at the time, but in 1904 it fell into possession and proved to be worth about 3500*l.* The widow of the intestate now claimed to be absolutely entitled to the whole under s. 1 of the Intestates' Estates Act, 1890, on the ground that at the date of the death of the intestate the net value of such "real and personal estates" did not exceed 500*l.*:—

*Held*, that the value of the intestate's real and personal estates must be taken as at his death, and the whole passed absolutely to his widow for such estate and interest as the intestate had therein:

The fact that the Intestates' Estates Act, 1890, only contains provisions for ascertaining the net value of real and personal property in possession does not exclude interests in reversion from the operation of the general words of s. 1 of the Act. *In re HEATH. HEATH v. WIDGEON Kekewich J. 270*

**HYDRANTS, FIRE**—Capital money—Improvements—Irish estates—Principal mansion-house—Water supply — — **417**  
*See* **SETTLED LAND**. 3.

**IMPROVEMENTS**—Settled estates.

*See* under **SETTLED LAND**.

**INCOME**—Capital or—Shares in company—Unauthorized investments—Accretion  
*See* **TRUSTEE**. **424**

—Tenant for life and remainderman—Annuity—Apportionment—Capital and income  
*See* **SETTLED LAND**. 1. **596**

**INCOME TAX**—Mortgage—Deduction of income tax—"Yearly interest" — — **448**  
*See* **REVENUE**.

**INDEMNITY**—Costs of plaintiff's solicitors—Costs of trustees—Trustees' right of indemnity—Priority — — **126, 539**  
*See* **SOLICITOR**. 2.

**INDIA**—Practice—Staying action—Cause of action arising out of jurisdiction — **205**  
*See* **PRACTICE**. 4.

**INFANT**—*Ward of Court—Guardian—Religious Education—Welfare of the Infant—Religion of Father—Change of Religious Education—Discretion of Court—Form of Order as to Education.*

By an order of April, 1904, the son and daughter of a Jewish father, then aged respectively ten and eight years, were directed to be brought up in their father's religion, and, both parents being dead, were placed in a Jewish household for this purpose. In March, 1907, the boy wrote to his guardian that he no longer wished to be educated as a Jew. This letter was sent to the judge, who, after interviews with

**INFANT**—*continued*.

the boy and further inquiries, came to the conclusion that the welfare of the boy demanded his sanction to a change in his religious education, and he accordingly made an order that both infants should be henceforth brought up in the Christian religion :—

*Held* (affirming Kekewich J. on this point), that it would be morally injurious to the welfare of the boy not to give effect to his wishes, but as there was no evidence to justify any order changing the religious education of the girl, this portion of the order must be varied. In all orders relating to the religious education of a ward of Court the words “until further order” must, from the nature of the case, be deemed to be inserted. *In re W. W. v. M.*

C. A. 557

— Will — Construction — Gifts to persons “born” previously to date of will—  
Infant “en ventre sa mère” — 46  
*See WILL. 6.*

**INJUNCTION**—Letters—Biography—Authority to write—Use of information contained in letters — — — — 577  
*See LETTERS.*

— Name—Descriptive of article and process used—Similarity of name—Company—Registered name — — — 312  
*See TRADE NAME. 2.*

**INROLMENT**—Disentailing assurance—Execution by tenant in tail—Death of tenant in tail — — — — 332  
*See ESTATE TAIL.*

**INTEREST**—Mortgage deferring payment of—Tenant for life and remainderman—Power to postpone conversion — 296  
*See WILL. 2.*

— Tenant for life and remainderman—Residue—Annuity—Apportionment—Capital and income—Simple interest — 596  
*See SETTLED LAND. 1.*

— Vested legacies—Interest until payment—Infants — — — — 46  
*See WILL. 6.*

**INTERLOCUTORY ORDER**—Final or—Appeal—Leave—Solicitor and client—Costs—Taxation—Summons to review—Refusal — — — — 145  
*See PRACTICE. 1.*

**INTESTATES' ESTATES ACT**—Intestacy of husband—Widow—Contingent reversionary interest—Real and personal estate — — — — 270  
*See HUSBAND AND WIFE.*

**INVESTMENTS**—Charity Commissioners, Consent of—Foundation deed—Investment in land — — — — 383  
*See CHARITY. 1.*

— Trustees—Shares in company—Substitution of shares in different companies—Unauthorized investments — — 424  
*See TRUSTEE.*

**IRELAND**—Settled land—Capital money—Improvements—Irish estates — 417  
*See SETTLED LAND. 3.*

**JUDGMENT**—Declaratory judgment—Costs—Lease—Licence to assign—Unreasonably withheld—Condition imposing increased rent — — — 229  
*See LANDLORD AND TENANT. 1.*

— Judgment creditor—Charging order—Appointment of receiver—Equitable execution — — — — 157  
*See FRAUDULENT CONVEYANCE.*

**JUDICATURE**—Procedure—Appeal—Leave—Interlocutory or final order—Solicitor and client—Costs—Taxation — 145  
*See PRACTICE. 1.*

**JURISDICTION**—Practice—Staying action—Cause of action arising out of jurisdiction—India — — — — 205  
*See PRACTICE. 4.*

— Settled estates—English settlement—Real estate in Scotland—“Capital moneys” Improvements “on Scotch real estate”  
*See SETTLED LAND. 4.* 496

**LACHES**—Attorney-General—Delay—London Building Act — — — — 23  
*See LONDON.*

**LAND TRANSFER**—Costs—Administration—“Testamentary expenses” — 149, 164, n.  
*See PRACTICE. 2, 3.*

**LANDLORD AND TENANT**—Assign, Licence to—Lease—Unreasonably withheld—Condition imposing increased Rent—“Fine or sum of Money in the Nature of a Fine”—*Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 2, sub-s. 9—Conveyancing and Law of Property Act, 1892 (55 & 56 Vict. c. 13), s. 3—Declaratory Judgment—Costs.*

The lessee of a hotel, who had covenanted not to assign without the lessor's consent unless “unreasonably withheld,” asked permission to assign to a certain brewery. The lease had twelve years to run.

The lessor, who entertained a strong opinion that a brewery tie would depreciate the value of the hotel, gave an unconditional consent to the assignment to a private person who would carry on the business as a free house, and added, “but if you desire to assign the tenancy to a brewery firm, then the rent must be increased by twenty-five pounds (25*l.*) per annum and the term extended from twelve to twenty-one years.”

His sole object in imposing these conditions was to recoup himself for the depreciation that would be caused by the tie :—

*Held*, that the demand of an increased rent as a condition for consenting to an assignment to a brewery was a demand of a “fine or sum of money in the nature of a fine,” and, being as such directly contrary to the proviso precluding any such demand imported into the lease by s. 3 of the Conveyancing Act, 1892, was unreasonable. The consent had therefore been “unreasonably

**LANDLORD AND TENANT—continued.**

withheld," and the lessee was entitled to assign to the brewery without further consent.

*Held*, also, that the lessee, having no cause of action against the lessor for unreasonably withholding his consent, was not entitled to the costs of an action to obtain the above declaratory judgment. **JENKINS v. PRICE**

**Swinfen Eady J. 229**

**2. — Determination of Tenancy—Lease for Term of Years—Express Tenancy at Will created on Expiration of Term—Implied Incorporation of Terms of Lease—Arbitration Clause—Action for Occupation Rent—Staying Proceedings—Arbitration Act, 1889 (52 & 53 Vict. c. 49), ss. 4, 27.**

A colliery lease, which empowered the lessees to carry foreign coal over the surface, provided that all disputes relating to the lease should be referred to arbitration. Shortly before the expiration of the term the lessees by letter requested the lessors to grant an extension of the lease on the existing terms for six months, and the lessors wrote in reply that the lessees might consider themselves tenants at will of both mine and way-leave pending further arrangements. The lessors having brought an action against the lessees in respect of their exercise of the way-leave during the tenancy at will, the lessees applied for a stay of proceedings under s. 4 of the Arbitration Act, 1889:—

*Held*, upon the construction of the letters, that the terms of the lease, including the arbitration clause, applied to the tenancy at will, so far as applicable to such a tenancy, and that the proceedings ought to be stayed.

*Per* Cozens-Hardy M.R.: Where on the expiration of a lease the lessee is expressly authorized to continue in possession as tenant at will, in the absence of evidence of a contrary intention, the terms and conditions of the original lease apply to the tenancy at will so far as they are consistent with such tenancy. **MORGAN v. WILLIAM HARRISON, LIMITED**

**C. A. 137**

**3. — Mortgagee "as Agent," Lease by—Lessee's Covenant as to selling or removing Hay or Manure—Covenant running with Land.**

R., being the mortgagee of a farm belonging to B. and the collector of the rents thereof for B., but not in possession of the land, entered into an agreement under seal, expressed to be made between R. "as agent, hereinafter called 'the landlord,'" and S., "hereinafter called 'the tenant,'" whereby R. let the farm to S. from year to year. The agreement provided that the tenant should consume on the premises all hay and fodder, spread upon the land all manure and compost produced on the farm, not sell off any hay or fodder, and at the end of the tenancy leave all manure and compost.

R. subsequently sold and conveyed the farm to C., who brought an action to restrain S. from acting in contravention of the above-mentioned provision:—

*Held*—(1.) on the construction of the agreement, and having regard to the surrounding circumstances, that the demise was by the mort-

**LANDLORD AND TENANT—continued.**

gagee; (2.) that, in a demise under seal by a mortgagee, the description of the person letting "as agent" was not sufficient to prevent the demise operating on the legal estate vested in him; (3.) that C., as assignee of the reversion, could enforce any covenant in the lease which ran with the reversion; and (4.) that the covenant as to hay and manure did so run. **CHAPMAN v. SMITH** — — **Parker J. 97**

**LANDS CLAUSES ACTS—Railway Company—Special Act—Conveyance subject to restrictive covenant—Resale of part of land not required—Validity of covenant—Ultra vires** — — — — **366**  
*See* **VENDOR AND PURCHASER. 2.**

**LAUNDRY—Capital money—Improvements—Irish estates—Principal mansion-house—Water supply** — — — — **417**  
*See* **SETTLED LAND. 3.**

**LEASE—Costs—Taxation—Covenant for renewal** — — — — **54**  
*See* **SOLICITOR. 3.**

— **Landlord and tenant.**

*See* under **LANDLORD AND TENANT.**

— **Mortgagee "as agent," Lease by—Covenant running with land** — — — — **97**  
*See* **LANDLORD AND TENANT. 3.**

**LEGACIES.**

*See* under **WILL.**

— **Will—General or specific—Insufficiency of assets—Abatement—Legacy in satisfaction of a debt** — — — — **277**  
*See* **ADMINISTRATION. 1.**

**LETTERS—Biography—Authority to Write—Use of Information contained in Letters—Extracts and Paraphrases—Intention of Writer—Injunction.**

P. and his wife were authorized by W. to write his biography, but no express authority was given to publish any of his letters:—

*Held*, that P. and his wife were entitled to use the information contained in letters or documents written by W., which had lawfully come into their possession, for the purpose of compiling the biography, without any express or implied authority given by W. for that purpose; but they were not entitled to publish any letters of W., or any extracts therefrom, or paraphrases thereof.

So far as authority goes it is in favour of any use of letters except publication.

There is no warrant for extending the proprietary right to prohibit publication, and, so far as there is no rule of law of general application or created by special circumstances to prevent that result, the possession of a letter ought to be treated as conferring all the rights usually incident to property.

*Seemle*, the intention of the writer of a letter is not a satisfactory test of the lawfulness of the use to which it is put. **PHILIP v. PENNELL** subd.  
**Kekewich J. 577**



**LICENCE**—Lease—Licence to assign—Unreasonably withheld—Condition imposing increased rent — — — 229  
See LANDLORD AND TENANT. 1.

**LICENSING ACTS**—Compensation—Non-renewal of licence—Capital moneys—Applicable as proceeds of voluntary sale — — — — — 359  
See BREWERY COMPANY.

**LIGHT**—*Alteration of Building—Ancient Lights—Setting forward of Wall—Alteration in Height of Window—New Window receiving same Light as Old—Alterations made during Period of Acquisition of Right—Prescription Act, 1832 (2 & 3 Will. 4, c. 71), s. 3.*

The question whether the right to the access of light to a building which has been enjoyed through one window is preserved upon an alteration of the building depends on the identity of light, not on the identity of aperture.

In cases where the light comes to any window over the roof of higher buildings, at an angle, and the building is altered by advancing the wall in which the window is, the right to access of light will be preserved if any window or aperture in the new wall intercepts and gives access to any substantial part of the light which passed through the old window. It makes no difference that the new window or aperture is at a much higher level than the old window.

No alteration of a building, which would not involve the loss of a right to light when indefeasibly acquired, will, if made during the currency of the statutory period, prevent the acquisition of the right.

*Scott v. Pape*, (1886) 31 Ch. D. 554, followed.  
*Colls v. Home and Colonial Stores*, [1904] A. C. 179, explained. **ANDREWS v. WAITE**  
**Neville J. 500**

**2. — Enjoyment—Period before Action—“Consent or Agreement”—Easement—Prescription Act, 1832 (2 & 3 Will. 4, c. 71), ss. 3, 4.**

The effect of ss. 3 and 4 of the Prescription Act, as regards a claim to light, is that although the access and use of light have been enjoyed for twenty years without an interruption submitted to or acquiesced in for one year after notice to the party interrupted, and although the enjoyment has not been by some consent or agreement in writing, no right to the light is acquired under the Act, unless the enjoyment has been for the period of twenty years next before some suit or action in which the right is brought in question.

The right, if any, under the Act, by reason of enjoyment for twenty years, is inchoate only until it is established in legal proceedings.

C., who was the tenant of a cowshed owned in fee simple by H., had in 1896 been in the actual enjoyment of the access of light over the adjoining land of V. to the windows of the shed for more than nineteen years without any interruption. In 1896, at the end of this period of enjoyment, V. obstructed the windows. C. at once removed the obstruction, and the windows remained unobstructed, until 1898, when W., the surveyor of V., by his instructions again obstructed the windows. C. again removed the

**LIGHT—continued.**

obstruction, but, being under the erroneous impression that he was not entitled to an injunction to restrain the obstruction, he interviewed W., who told him that V. had again instructed him to obstruct the windows, and that he should do so unless C. gave him some document which would preserve the rights of V.

C. thereupon (in January, 1899) wrote a letter, addressed only to W., saying, “I will give you one shilling per annum for the use of those eight lights you have boarded up in my cowshed.” No answer was sent to this letter, but W. had it stamped as an agreement, and in reliance on it V. refrained from re-erecting the obstruction. The promised shilling was never paid. Payment of the arrears was demanded in June, 1903, but not made. In July, 1906, V. again obstructed the windows, and within a week H. commenced an action against V. for an injunction to restrain the obstruction :—

*Held*, that the letter was a “consent or agreement expressly made or given,” for the purpose of the enjoyment of the access and use of the light, “by writing,” within the meaning of s. 3 of the Act, and that as there had not been enjoyment, without such consent or agreement, for the twenty years next before the commencement of the action, H. had not a right to the enjoyment of the light under the Act.

The principle of *Simper v. Foley*, (1862) 2 J. & H. 555, and *Ladyman v. Grave*, (1871) L. R. 6 Ch. 763, not extended so as to exclude, in the computation of the twenty years before next action, a period during which enjoyment has been by a consent or agreement within s. 3 of the Act. **HYMAN v. VAN DEN BERGH**

**Parker J. 516**

— Title — Defect — Guarantee — Restrictive stipulation — — — — — 191  
See VENDOR AND PURCHASER. 3.

**LIMITATIONS, STATUTES OF—Mortgage—Extinguishment of Title of Second Mortgagee—Effect of Possession of First Mortgagee—Non-suspension of Statutory Period—Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), ss. 2, 3, 5—Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), ss. 1, 2.**

When the right of action of a mortgagee to recover land has accrued, the possession of the land by a prior mortgagee does not suspend the running of the period of limitation against the subsequent mortgagee.

The dictum of Romer J. in *Kibble v. Fairthorne*, [1895] 1 Ch. 219, followed.

*Trustees, Executors, and Agency Co. v. Short*, (1888) 13 App. Cas. 793, explained. **SAMUEL JOHNSON & SONS, LIMITED v. BROCK**

**Parker J. 533**

**2. — Part Payment—Solicitor's Bill—Recovery of Moneys due to Client—Retainer on Account with assent of Client.**

Appeal from a decision of Kekewich J., [1906] 2 Ch. 359. Settlement arrived at under which the appeal was to be dismissed without costs. *In re BOSWELL. MERRITT v. BOSWELL*

**C. A. 331**



**LIQUIDATOR** — Company—Duty to stamp and file contracts with respect to shares issued for a consideration other than cash — — — — — 92  
See COMPANY. 8.

**LOCAL GOVERNMENT** — *Creation of Urban District—Subtraction of Parish from Rural District—Loss of rateable Area—Compensation—Compromise of Claims, including Claim for Loss of rateable Area—Validity—Local Government Act, 1888 (51 & 52 Vict. c. 41), ss. 57, 62—Local Government Act, 1894 (56 & 57 Vict. c. 73), ss. 54, 68—Costs—Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1.*

It is no ground for setting aside a compromise that the claim, or one of the claims, made by one of the parties was not well founded in law, provided that it was put forward bona fide.

On the formation in 1900 of an urban district out of a rural district an adjustment had to be made between the two councils under the Local Government Act, 1894, of the property, income, debts, liabilities, and expenses affected by the formation of the urban district. A number of claims were put forward by the two councils against each other, including one by the rural council in respect of loss of income owing to the transfer of rateable area from the district of the rural council to that of the urban council. After considerable negotiations the two councils entered into an agreement of compromise by which the urban council covenanted to pay to the rural council a sum of 1500*l.* by thirty annual instalments of 50*l.* each, in consideration of which the rural council released the urban council from certain specified claims, including the claim for compensation for loss of income owing to the transfer of rateable area, and all other claims (if any) which the rural council had or might have against the urban council in respect of any property, income, debts, liabilities, or expenses, and the urban council also released the rural council from all claims in a similar way. At the time when the agreement was made it was considered that loss of rateable area was a matter of adjustment, but in 1904 the House of Lords decided, in *Caterham Urban Council v. Godstone Rural Council*, [1904] A. C. 171, that loss of rateable area was not a matter of adjustment. In 1906 the urban council brought an action for a declaration that the agreement was ultra vires the urban council and not binding on it :—

*Held*, that the agreement, having been entered into bona fide by both councils, was not rendered invalid by the fact that one of the claims included in the compromise subsequently proved to be unfounded in law.

*Held*, also, that the case was not one which fell within s. 1 of the Public Authorities Protection Act, 1893, and therefore, that the rural council was not entitled to solicitor and client costs. **HOLSWORTHY URBAN DISTRICT COUNCIL v. RURAL DISTRICT COUNCIL OF HOLSWORTHY** — — — **Warrington J. 62**

**LONDON** — *Buildings not of uniform Height—Gabled Building—"Height"—"External Wall"—New Street—Width of Street—Restrictions—Part—Alleged to Offend—Method of*

**LONDON**—*continued.*

*Measurement—London Building Act, 1894 (57 & 58 Vict. c. cxxiii.), s. 5, sub-ss. 15, 21; s. 49—Attorney-General—Laches—Delay.*

In determining whether a building which is not of uniform height contravenes the provisions regulating the height of buildings contained in s. 49 of the London Building Act, 1894, the building must not be regarded as a whole, but each part alleged to offend against the Act must be treated and examined as if it were a separate building, and, for the purpose of ascertaining the height permitted by the section, the distance from the opposite side of the street of the front or external wall of the particular part under examination (whether the same is or is not the front wall of the building considered as a whole) must be measured from the point at which a line dropped vertically down that front or external wall would reach the ground level.

There is nothing in s. 49 to prohibit the erection of a building in a series of steps or terraces, one behind the other, so long as the provisions of the Act are duly observed.

A narrow cul de sac in existence before August 7, 1862, but which had been subsequently opened up into a thoroughfare and widened out:—

*Held* to be a new street for the purposes of s. 49. **ATTORNEY-GENERAL v. METCALF & GREIG** **Kekewich J. 23**

**LUNACY** — *Lunatic—Committee and Receiver—Default—Accounts—Death of Lunatic—Subsequent Receipts—Surety—Liability.*

The committee or receiver of the estate of a lunatic is not accountable in the lunacy, in his character of committee or receiver, for rents and profits received by him after the lunatic's death; and consequently, where the committee or receiver has made default, his surety is not liable in respect of any such receipts. *In re WALKER* **C. A. 120**

— *Lunatic out of the Jurisdiction—Foreign Curator—English Stocks and Shares—Transfer—Discretion of Judge in Lunacy—Special Circumstances—Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 134.*

Order made under s. 134 of the Lunacy Act, 1890, upon the application of the curator of a lunatic resident in France, and under the special circumstances of the case, for the transfer of stocks and shares in England to which the lunatic was entitled, although the same were not required for his maintenance. *In re Elias*, (1851) 3 Mac. & G. 234, followed. *In re J. L. S. DE LARRAGOITI (A PERSON OF UNSOUND MIND)* **C. A. 14**

— *Sale by mortgagee—Surplus proceeds of sale—Lunacy of mortgagor* — — — **20**  
See MORTGAGE.

**MANAGER** — *Company—Receiver and manager—Insufficient estate—Costs—Priorities—Bankruptcy of receiver* — — — **511**  
See COMPANY. 1.

**MANAGING DIRECTOR.**

See under COMPANY.

**MARRIAGE**—Nullity—*Marriage before Registrar*—False Notice—Widow married in Maiden Name—*Marriage and Registration Act, 1856, (19 & 20 Vict. c. 119), ss. 3, 17, 18, 19.*

In order to keep her second marriage secret, a widow, whose life interest under her first husband's will ceased on remarriage, was married before a registrar in her maiden name, the previous statutory notice given under the *Marriage and Registration Act, 1856, s. 3*, being false to the knowledge of both spouses in this and other respects :—

*Held*, that the marriage was valid and the widow's life interest had ceased.

*Holmes v. Simmons*, (1868) L. R. 1 P. & M. 523, 529; *Prowse v. Spurway*, (1877) 46 L. J. (P. D. & A.) 49; *Lane v. Goodwin*, (1843) 4 Q. B. 361; and *Mayhew v. Mayhew*, (1812) 2 Phillim. 11, applied. *In re RUTTER. DONALDSON v. RUTTER. Swinfen Eady J. 592*

**MANSION-HOUSE**—Capital money—Improvements—Irish estates — — — 417  
*See SETTLED LAND. 3.*

**MEETING**—Club—Rules—Power to alter—Resolution—Validity — — — 1  
*See CLUB.*

## **MERCHANT SHIPPING.**

*See under SHIPPING.*

**MINE**—Sewer and sewage works—Right to support of—Mines and minerals—Adjacent lands — — — 600  
*See SEWERS.*

**MISCONDUCT**—Dentist—Report of Dental Committee—"Professional misconduct"—Partnership—Construction of articles  
*See EVIDENCE. 1. 236*

**MISREPRESENTATION**—Deed, Misrepresentation as to character of—Plea of non est factum—Validity—Plea good as to part of deed — — — — — 222  
*See DEED.*

**MORTGAGE**—Priority—Fictitious Sale by Trustee for Sale—Conveyance containing Receipt for Money never paid—Equitable Mortgagee without Notice—Prior Equity of Beneficiaries—Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 54, sub-s. 1; s. 55, sub-s. 1.

A testator died in 1895, having by his will given his real estate to his son C., and one L., upon trust to sell, and divide the proceeds among his four children (including C.), each share being settled on trusts for a child for life, and afterwards for the children of that child. L. having died in August, 1904, from then till January, 1905, C. was the sole executor and trustee of the will. In September, 1904, C. and another severally owed money to one M. on promissory notes for 2000*l.* C. and M., in fraud of the rights of the beneficiaries under the will (M. having full notice of the breach of trust), arranged that the 2000*l.* should be further secured on part of the trust estate, and to carry out the arrangement C.

## **MORTGAGE—continued.**

on September 29, 1904, executed and delivered to M. what purported to be a conveyance on sale of part of the land held in trust to M. in consideration of 2000*l.* The deed contained the usual receipt for the purchase-money, but no part of the 2000*l.* was ever paid, it being arranged that the deed was to be held as security for the money due on the notes to the extent to which they should be dishonoured. In April, 1905, M. deposited the deed with B., and gave him a memorandum charging the land conveyed with 1000*l.* lent by B., who had no actual or constructive notice that any breach of trust had been committed, or that the 2000*l.* had not been paid by M., and had not been guilty of any conduct which would have made his equity inferior to that of the beneficiaries :—

*Held*, that there was no contract for sale, and therefore no vendor's lien, but an equity in the beneficiaries to have the property sold and the proceeds divided; that the beneficiaries were not estopped by the receipt from saying that the money had not been paid or that the real transaction was not a sale and purchase; and that, the equities of the beneficiaries and B. being equal in every other respect, the equity of the beneficiaries must prevail by reason of its priority in point of time.

*Lloyd's Bank v. Bullock*, [1896] 2 Ch. 192, distinguished. *CAPELL v. WINTER*

Parker J. 376

2. — Priority—Legal Estate—Subsequent Equitable Interest—Postponement—Fraud—Negligence—Omission to get Possession of Title Deeds—Trustee's Negligence—Position of *Cestui que Trust*.

By his marriage settlement W. conveyed real estate to trustees to be held upon trusts under which he took a life interest determinable on alienation, and, subject to that and to a discretionary trust in the event of his interest determining in his lifetime, his wife was entitled for her life. The same solicitors acted for all parties. They had in their possession a bundle of deeds purporting to be the title deeds of the property, and were not aware that W. still retained the deeds by which the property was conveyed to him. Some years after the marriage W. mortgaged the property and handed over the conveyance to the mortgagee, who afterwards sold the property. Neither the mortgagee nor the purchaser from him had any notice of the settlement. W. absconded, and his wife brought an action against the purchaser, the trustees, and her husband for a declaration that W.'s life interest had determined and that the purchaser's interest in the property was subject to her interest under the settlement :—

*Held*, that all the parties except W. had acted honestly, but that the trustees had been guilty of negligence, and their legal estate must be postponed to the subsequent equitable interest of the purchaser from the mortgagee; and that the plaintiff was in no better position than her trustees.

*Lloyd's Banking Co. v. Jones*, (1885) 29 Ch. D. 221, followed. *WALKER v. LINOL*

Parker J. 104

**MORTGAGE—continued.**

3. — *Sale by Mortgagee—Surplus Proceeds of Sale—Trust for Mortgagor, "his Heirs or Assigns"—Conversion—Really or Personally—Lunacy of Mortgagor.*

The trust of the surplus proceeds of sale provided that they should be paid to the mortgagor, "his heirs or assigns." The mortgaged property was sold in 1900 under the power of sale contained in the mortgage, and there was a considerable surplus. The mortgagor became a lunatic after the mortgage, but before the sale, and continued in that condition until his death intestate in 1906:—

*Held*, that the surplus proceeds of sale must be treated as personally notwithstanding the language of the trust.

Decision of Parker J., [1907] 1 Ch. 313, affirmed. *In re GRANGE. CHADWICK v. GRANGE* — — — — — **C. A. 20**

4. — *Voluntary Assignment of Part of Property comprised in Mortgage—No Covenants for Title, express or implied—Paramount Charge—Administration of Assignor's Estate—Payment of Mortgage Debt by Executors—Liability of Assignee to contribute.*

An assignor deposited with his bankers the title deeds of certain leasehold premises together with a policy of assurance on his own life and certain dock warrants, and executed a deed of charge and memorandum of deposit to secure the payment of the balance for the time being due on any accounts he might have with the bank. He subsequently, by a voluntary deed, assigned the leasehold premises to his wife. The deed contained no reference to the charge and memorandum of deposit, and no covenants for title, express or implied. By his will he gave all his property to trustees upon trusts for the benefit of his wife and children. On the death of the assignors his executors paid off the debt due to the bank. On an application to the Court for the determination of the question whether the widow, as assignee of the leaseholds, was liable to contribute to the payment of the debt:—

*Held*, that the charge being one created by the assignor himself, and not a charge paramount to his own title, the widow was under no liability to contribute.

*Ker v. Ker*, (1869) Ir. R. 4 Eq. 15, explained and distinguished. *In re Jones*, [1893] 2 Ch. 461, distinguished. *In re DARBY'S ESTATE. RENDALL v. DARBY* — **Warrington J. 465**

— *Brewery company—Compensation—Non-renewal of licence—Capital moneys—Applicable as proceeds of voluntary sale—Mortgaged licensed premises* — **359**  
*See BREWERY COMPANY.*

— *Devise of mortgaged estate—Partition action—Fund in Court representing rents and profits—Administration action—Right of creditors to attach fund before judgment* — — — **304**  
*See ADMINISTRATION. 2.*

— *Income tax, Deduction of—"Yearly interest"* — — — — — **448**  
*See REVENUE.*

**MORTGAGE—continued.**

— *Lease by mortgagee "as agent"—Covenant running with land* — — — **97**  
*See LANDLORD AND TENANT. 3.*

— *Real property limitation—Mortgagee—Extinguishment of title of second mortgagee—Effect of possession of first mortgagee—Non-suspension of statutory period* — — — — — **533**  
*See LIMITATIONS, STATUTES OF. 1.*

— *Receiver—Partition action—Sale by mortgagee with sanction of Court—Purchase by receiver without sanction* — **292**  
*See RECEIVER.*

— *Ship—Shares—Equitable interests—Unregistered mortgage—Contract to sell share to part-owner without notice—Mortgagee's right to stop application of purchase-money* — — — **284**  
*See SHIPPING.*

— *Tenant for life and remainderman—Power to postpone conversion—Mortgage deferring payment of interest* — **296**  
*See WILL. 2.*

**NAME**—Trade name.  
*See under TRADE NAME.*

**NEGLIGENCE**—Trustee's negligence—Omission to get possession of title deeds—Priority  
*See MORTGAGE. 2.* **104**

**NEXT OF KIN**—According to the statute—Time for ascertaining class — — — **572**  
*See WILL. 3.*

— *Executor—Express trust of residue—Partial failure of beneficial interest* — **84**  
*See WILL. 1.*

**NON EST FACTUM**—Plea of—Validity—Misrepresentation as to character of deed—Plea good as to part of deed — **222**  
*See DEED.*

**NULLITY**—Marriage—False notice—Widow married in maiden name — — — **592**  
*See MARRIAGE.*

**ONUS OF PROOF**—Trade mark—Registration — — — — — **435**  
*See TRADE MARK. 3.*

**PARTITION ACTION**—Devise of mortgaged estate—Fund in Court representing rents and profits—Administration action—Right of creditors to attach fund before judgment — — — **304**  
*See ADMINISTRATION. 2.*

— *Sale by mortgagee with sanction of Court—Purchase by receiver without sanction* — **292**  
*See RECEIVER.*

**PARTNERSHIP**—Dentist—Report of Dental Committee—Construction of articles—"Professional misconduct" — **236**  
*See EVIDENCE. 1.*



**PARTNERSHIP**—*continued*.

— Will—Deceased partner—Specific devise of partnership realty—Solvent partnership — — — — — 88  
*See WILL. 4.*

**PATENT**—Trade mark—Patented article—Registration—Removal from register after twenty years — — — 478  
*See TRADE MARK. 4.*

**PERSONALTY**—Realty or—Sale by mortgagee—Surplus proceeds of sale—Conversion—Lunacy of mortgagor — — — 20  
*See MORTGAGE. 3.*

**PLEA**—Non est factum—Validity—Misrepresentation as to character of deed—Plea good as to part of deed — — — 222  
*See DEED.*

**POSSESSION**—Mortgagee—Extinguishment of title of second mortgagee—Effect of possession of first mortgagee—Non-suspension of statutory period — 533  
*See LIMITATIONS, STATUTES OF. 1.*

**POWER OF SALE**—Company, Constitution of—Power to acquire land—No express power of sale—Implied power — 259  
*See VENDOR AND PURCHASER. 1.*

— Ship—Shares—Equitable interests—Unregistered mortgage—Contract to sell shares to part-owner without notice—Mortgagee's right to stop application of purchase-money — — — 284  
*See SHIPPING.*

**PRACTICE**—*Appeal—Leave—Interlocutory or Final Order—Solicitor and Client—Costs—Taxation—Summons to Review—Refusal—Judicature (Procedure) Act, 1894 (57 & 58 Vict. c. 16), s. 1.*

An order dismissing a summons to review the taxation of a solicitor's bill of costs under the Solicitors Act, 1843, is not final, but interlocutory, and leave to appeal from such an order is necessary under s. 1 of the Judicature (Procedure) Act, 1894. *In re JEROME* — **C. A. 145**

**2. — Costs — Administration — “Testamentary Expenses” — Will — Direction to Pay out of Personal Estate—Real Estate—Inquiry as to Heir-at-law—Incidence of Costs—Land Transfer Act, 1897 (61 & 62 Vict. c. 65), s. 1, sub-s. 1; s. 2, sub-ss. 1, 2, 3; s. 3, sub-s. 1—Rules of Supreme Court, Order LV., r. 4A.**

Testatrix died intestate as to her real estate, having by her will directed that her testamentary expenses should be paid out of her personal estate:—

*Held*, that, although the effect of the Land Transfer Act, 1897, Part I., has been to make the costs of administering real estate testamentary expenses, the ordinary practice of the Chancery Division (that the costs of administration, so far as they have been increased by the administration of the real estate, shall be borne by that real estate) is nevertheless still applicable, and accordingly the costs of the inquiry as to the testatrix's heir-at-law must be borne

**PRACTICE**—*continued*.

by the realty, notwithstanding the general direction contained in the will that the testamentary expenses were to be paid out of the personality.

*Patching v. Barnett*, (1881) 51 L. J. (Ch.) 74 ([1907] 2 Ch. 154, n.), discussed and followed. *In re Jones*, [1902] 1 Ch. 92, followed.

If a testator intends that the cost of administering his real estate shall be borne by his personal estate, the will must contain a specific direction to that effect. *In re BETTS, DOUGHTY v. WALKER* — — — **Kekewich J. 149**

**3. — Costs — Administration — Testamentary Expenses—Real Estate—Personal Estate.**

*Per Sir G. Jessel M.R.*: “I think it important to say that in the administration of real and personal estate the modern rule is that the costs exclusively occasioned by the administration of the real estate are thrown upon the real estate. The general costs of the suit are borne by the personal estate, but what I will call the increased costs arising from administering the real estate are, as a rule, thrown upon the real estate; and the Courts have been in the habit for several years past of apportioning these costs at the hearing, instead of throwing upon the taxing Master the very difficult task of ascertaining how much of each bill of costs brought in by the solicitors has been occasioned exclusively by the real estate administration, and how much by the personal estate administration. That rule has been found to be very convenient and to save great cost, delay, and difficulty in the taxing office. The judge, as a rule, knows more about the suit and is better able to apportion the costs, to say nothing of his superior knowledge of law, than the taxing Master; and it has been my habit for years past, whenever requested to do so, to apportion the costs, and to give some aliquot sum which is, to the best of my judgment, a fair proportion to be paid.” *PATCHING v. BARNETT, C. A.*, (1881) 51 L. J. Ch. 74

**C. A. [1907] 2 Ch. 154, n.**

**4. — Staying Action — Cause of Action arising out of Jurisdiction — India — Action brought Vexatiously and Oppressively — Accessible Court where Cause of Action arose — Inconvenience causing Injustice to Defendant.**

In 1902 a deed of separation was executed in India between the plaintiff and her husband, of which the defendant was the trustee. The plaintiff was the wife of an American domiciled in India, and the defendant then and still was a solicitor practising at Madras. The husband made default in paying the allowance which by the deed he had covenanted to pay, and the complaint of the plaintiff against the defendant was that he had wilfully or negligently delayed taking proceedings, and had so wilfully or negligently conducted proceedings against her husband that she had been unable to recover the moneys due to her in respect of the allowance. In October, 1906, the defendant happened to be in England on a holiday, and on the day before he left for India he was served with the writ in the action. At the date of the issue of the writ the plaintiff was temporarily in England, but left shortly afterwards for America,



**PRACTICE**—*continued*.

where she still remained. The plaintiff knew of her alleged cause of action when she was resident in India. On an application by the defendant to dismiss or stay the action on the ground that it was an abuse of the process of the Court:—

*Held*, that, inasmuch as the alleged cause of action arose in India, and that the liability, if any, of the defendant would have to be determined according to the law of India, and upon the evidence of Indian witnesses, the proper place for the action to be brought was India; that the action was not brought bona fide in England; that the injustice to the defendant in bringing the action in this country was so great that the Court would not allow the action to proceed; and that the fact that the plaintiff happened to be in England at the date of the issue of the writ was not in itself sufficient to preclude the Court from dismissing the action.

*Logan v. Bank of Scotland (No. 2)*, [1906]  
1 K. B. 141, applied. **EGBERT v. SHORT**

**Warrington J. 205**

— Adjourned summons—Costs - - - 406  
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— Costs.  
*See under COSTS.*

— Staying proceedings—Lease for term of years—Arbitration clause—Action for occupation rent - - - 137  
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**PRESCRIPTION**—Light.  
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**PRESUMPTION**—Death without issue—Evidence—Sufficiency—Practice - 354  
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**PRINCIPAL AND SURETY**—Lunatic—Committee and receiver—Default—Account—Death of lunatic—Subsequent receipts—Surety—Liability 120  
*See LUNACY. 1.*

**PRIORITY**—Costs—Company—Receiver and manager—Insufficient estate—Bankruptcy of receiver - - - 511  
*See COMPANY. 1.*

— Costs of plaintiff's solicitors—Costs of trustees—Trustees' right of indemnity  
*See SOLICITOR. 2.* 126, 539

— Mortgages—Fictitious sale by trustee for sale—Conveyance containing receipt for money never paid - - - 376  
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— Trustee's negligence—Omission to get possession of title-deeds - - - 104  
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**PROSPECTUS**—Untrue statement—Directors—Liability of estate of deceased director—Costs - - - - - 571  
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**PUBLIC HEALTH**—Drain—Sewer—Vesting in local authority—Title—Defect - 191  
*See VENDOR AND PURCHASER. 3.*

— Sewer and sewage works—Right to support of—Mines and minerals—Adjacent lands - - - - - 600  
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**PUBLIC HOUSE**—Settled estates—Structural alterations—"Capital moneys"—"Improvements" - - - - 496  
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**PURCHASER**—Vendor and.  
*See under VENDOR AND PURCHASER.*

**RAILWAY**—Special Act—Conveyance subject to restrictive covenant—Resale of part of land not required—Validity of covenant—Ultra vires - - - - 366  
*See VENDOR AND PURCHASER. 2.*

**REAL PROPERTY LIMITATION.**  
*See under LIMITATIONS, STATUTES OF.*

**REALTY**—Personalty or—Sale by mortgagee—Surplus proceeds of sale—Conversion—Lunacy of mortgagor - - - 20  
*See MORTGAGE. 3.*

**RECEIPT**—Mortgage—Priority—Fictitious sale by trustee for sale—Conveyance containing receipt for money never paid—Equitable mortgagee without notice  
*See MORTGAGE. 1.* 376

**RECEIVER**—*Partition Action—Sale by Mortgagee with Sanction of Court—Purchase by Receiver without Sanction.*

A receiver appointed by the Court cannot purchase the property of which he is receiver without the sanction of the Court, even where the sale is made, not under a decree in the action, but by a mortgagee selling with leave outside the action.

*Alven v. Bond*, (1841) Fl. & K. 196, 213, followed and applied. **NUGENT v. NUGENT**  
**Swinfen Eady J. 292**

— Committee and receiver—Lunatic—Default—Accounts—Death of lunatic—Subsequent receipts—Surety—Liability 120  
*See LUNACY. 1.*

— Company—Receiver and manager—Insufficient estate—Costs—Priorities—Bankruptcy of receiver - - - 511  
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— Judgment creditor—Charging order—Appointment of receiver—Equitable execution—Injunction—Settlement set aside - - - - - 157  
*See FRAUDULENT CONVEYANCE.*

**REGISTRAR**—Registration.

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**REGISTRATION**—Company—Debentures—Certificate of registrar—Conclusiveness of certificate — — — — 471  
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— Marriage and Registration—False notice—Widow married in maiden name — 592  
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**RELIGIOUS EDUCATION**—Change of—Infant—Ward of Court—Religion of father—Discretion of Court — — — 557  
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**REMAINDERMAN**—Tenant for life and.  
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**REMUNERATION**—Director.  
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**RESIDUE**—Executor—Express trust of residue—Partial failure of beneficial interest—Next-of-kin — — — — 84  
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— Testator's liabilities—Covenant to pay life annuity—Capital and income—Appportionment — — — — 596  
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**RESIGNATION**—Managing director—"Vacating office"—Withdrawal before acceptance—Articles—Construction — — 370  
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**RETAINER**—Solicitor's bill—Part payment—Recovery of moneys due to client—Retainer on account with assent of client — — — — 331  
See LIMITATIONS, STATUTE OF. 2.

— Trustees — Unauthorized Investments — Settlement—Shares in company—Substitution of shares in different companies  
See TRUSTEE. 424

**REVENUE**—Income Tax—Mortgage—Interest at 5 per Cent. per Annum payable in Lump Sum at Uncertain Date—Deduction of Income Tax—"Yearly Interest"—Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 40—Revenue (No. 1) Act, 1864 (27 & 28 Vict. c. 18), s. 15.

By a mortgage of June 1, 1888, the mortgagor covenanted that on his death or on his son's death, whichever event should first happen, he, his executors, administrators or assigns, would pay to the mortgagee the principal sum secured, together with simple interest thereon at the rate of 5 per cent. per annum reckoned from August 10, 1887, up to the time of such death, and, if the aggregate amount of this sum and interest

**REVENUE**—continued.

or any part thereof should not then be paid, would pay interest on the unpaid part by equal half-yearly payments. The mortgagor predeceased his son and died in 1906. His executor paid to the mortgagee interest on the aggregate sum, consisting of principal and interest found due at the mortgagor's death. He now proposed to pay off the aggregate amount due on the mortgage, and claimed the right in doing so to deduct income tax on so much of the aggregate sum as represented interest:—

*Held*, that the interest had not been capitalized by the contract between the parties; that, inasmuch as the interest was calculable by the year, it was "yearly interest" within s. 40 of the Income Tax Act, 1853, although it was payable in a lump sum at an uncertain date; and that the mortgagor's executor was entitled to deduct income tax.

*Bebb v. Bunny*, (1854) 1 K. & J. 216, followed.

*Goslings & Sharpe v. Blake*, (1889) 23 Q. B. D. 324, distinguished.

*In re CRAVEN'S MORTGAGE. DAVIES v. CRAVEN* Warrington J. 448

**REVERSION**—Intestacy of husband—Widow—Contingent reversionary interest—Real and personal estate — — 270  
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**REVIEW**—Summons to—Refusal—Solicitor and client—Costs—Taxation — — 145  
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**RULES**—Club—Power to alter—Fundamental objects — — — — 1  
See CLUB.

**RULES OF SUPREME COURT**—Order LV., r 4A—Chambers in the Chancery Division  
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**SALE**—Charity land—Consent of Board of Education — — — — 486  
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— Mortgage — Priority — Fictitious sale by trustee for sale—Conveyance containing receipt for money never paid—Equitable mortgagee without notice — — 376  
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— Mortgagee, Sale by—Surplus proceeds of sale—Lunacy of mortgagor — — 20  
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— Power of sale.  
See under POWER OF SALE.

— Receiver, Purchase by, without sanction—Partition action—Sale by mortgagee with sanction of Court — — 292  
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— Vendor and purchaser. §  
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**SATISFACTION**—Will—Legacies—General or specific—Insufficiency of assets—Abatement—Legacy in satisfaction of a debt—Forgiveness of debt - - 277  
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**SCOTLAND**—Settled estates—English settlement—Real estate in Scotland—"Capital moneys"—"Improvements" on Scotch real estate—Jurisdiction 496  
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## SETTLED ESTATES.

See under SETTLED LAND.

—— Tenant for life and remainderman—Power to postpone conversion—Mortgage deferring payment of interest - 296  
See WILL. 2.

**SETTLED LAND**—Appointment—Annuity—Tenant for Life and Remainderman—Residue—Testator's Liabilities—Covenant to pay Life Annuity—Capital and Income—Apportionment—Simple Interest.

A testator who had covenanted to pay a life annuity gave half his residue to trustees upon trust for his daughter for life, if and when she attained twenty-five, with remainders over.

Until the daughter attained twenty-five the income, subject to maintenance up to a specified amount, was to be added to capital. The daughter attained twenty-five on October 8, 1907. The residue was earning 3 per cent. interest:—

*Held*, that each future instalment of the moiety of the annuity payable out of the daughter's share must as it accrued be apportioned between capital and income, as follows, viz., calculate what sum with 3 per cent. simple interest from October 8, 1907, to the day of payment would have met the particular instalment. Charge that sum to capital, the balance to income.

*Allhusen v. Whittell*, (1867) L. R. 4 Eq. 295, and *In re Harrison*, (1889) 43 Ch. D. 55, 61, followed.

*In re Bacon*, (1893) 62 L. J. (Ch.) 445, and *In re Henry*, [1907] 1 Ch. 30, not followed.

*In re PERKINS*. *BROWN v. PERKINS*

Swinfen Eady J. 596

2. — *Improvements—Drainage—New System—Engine-house—Tenant for Life and Remainderman—Capital Money—Settled Land Act*, 1882 (45 & 46 Vict. c. 38), s. 25, sub-s. (xii.).

A tenant for life of settled estates constructed an entirely new system of drainage at the principal mansion-house, which involved the structural alteration of rooms and connection of closets with the outer air. He also erected an engine-house for the purpose of housing the engines required to supply the mansion-house with electric light. Upon the tenant for life applying to be recouped out of capital moneys his expenditure in respect of these "improvements," as coming within s. 25 of the Settled Land Act, 1882:—

*Held*, that all expenditure substantially for the purpose of making one complete system of drainage, beginning at one end and going to the other, would be allowed out of capital money.

## SETTLED LAND—continued.

But *held*, that the expenditure upon the erection of the engine-house could not be allowed, as it would not "increase the value of the settled land for agricultural purposes or as woodland or otherwise," within the meaning of s. 25, sub-s. (xii.), of the Settled Land Act, 1882. The words "or otherwise" in the sub-section must be limited to purposes ejusdem generis. *In re LORD LECONFIELD'S SETTLED ESTATES*

Kekewich J. 340

3. — *Improvements—Irish Estates—Capital Money—Principal Mansion-house—Water Supply—Extinguishment of Fire—Fire Hydrants and Hose—Rebuilding Garden Walls—"Inclosing"—Laundry—Rebuilding Mansion-house—Settled Land Act*, 1882 (45 & 46 Vict. c. 38), s. 25, sub-s. (vi.), (vii.), (xx.).—*Settled Land Act*, 1890 (53 & 54 Vict. c. 69), s. 13, sub-s. (iv.); s. 15.

Upon the application of the tenant for life of settled land under s. 15 of the Settled Land Act, 1890, the Court authorized the application of capital moneys in payment of the cost—

(1.) Of the installation of a new water supply system in the principal mansion-house on the Irish estates, comprising also a complete equipment for extinguishing fire, including fire hydrants, hose, and other necessary fittings and apparatus, as being an improvement coming within s. 25, sub-s. (xiii.), of the Settled Land Act, 1882; and

(2.) Of rebuilding the walls of the garden attached to the same mansion-house, the old ruinous walls having been taken down and new walls inclosing more garden ground having been built in part on the site of the old walls, as being an improvement coming within the term "inclosing" in s. 25, sub-s. (vi.).

The application for the sanction of the Court under s. 13, sub-s. (iv.), of the Settled Land Act, 1890, to the payment out of capital moneys of the cost of the proposed rebuilding of a laundry, 250 yards away from the mansion-house, refused.

Sub-s. (xx.) of s. 25 of the Settled Land Act, 1882, in authorizing as an improvement the "reconstruction, enlargement, or improvement of any of those works," refers to any of the works previously mentioned in the section, however and whenever made, and does not merely refer to works already constructed under powers given by the Act. *In re EARL OF DUNRAVEN'S SETTLED ESTATES* - - Kekewich J. 417

4. — *Improvements—Scotland—Settled Estates—English Settlement—Real Estate in Scotland—"Capital Moneys"—"Improvements" on Scotch Real Estate—Jurisdiction—Settled Land Act*, 1882 (45 & 46 Vict. c. 38), s. 2, sub-s. 3, 10; ss. 21, 23, 34—*Settled Land Act*, 1890 (53 & 54 Vict. c. 69), s. 13.

The Court has jurisdiction to sanction the outlay of capital moneys on improvements of real estate in Scotland settled by an English settlement.

Structural alterations to a public-house including the re-arrangement of the bar, required by a licensing authority on granting a renewal of the licence, are improvements on which capital



**SETTLED LAND—continued.**

moneys may be expended. *In re GURNEY'S MARRIAGE SETTLEMENT.* SULLIVAN *v.* GURNEY — — — — **Neville J. 496**

5. — “Settlement”—*Settlement of Personality—Power to Invest in Land—Capital Money—Improvements—Tenant for Life—Settled Land Act, 1882* (45 & 46 Vict. c. 38), s. 2, sub-s. 1; ss. 33, 58, sub-s. 1, cl. ix.; s. 63—*Settled Land Act, 1884* (47 & 48 Vict. c. 18), s. 7, sub-s. (i.), (ii.).

A settlement of purely personal property in the names of trustees upon trust for a lady for her life, and after her death for her children on attaining twenty-one or marrying, contained a power to the trustees to invest the trust funds in the purchase of lands to be held by them upon trust for sale, and until sale to apply the rents and profits in accordance with the trusts of the personal property. The trustees invested part of the trust funds in the purchase of lands which were conveyed to them to be held upon the trusts of the settlement. The tenant for life desired to be recouped out of capital moneys for expenditure on improvements upon part of the land so purchased; and the question was raised whether the settlement came within the provisions of the Settled Land Act, 1882:—

*Held*, that the settlement, although not in its inception a settlement of land, was nevertheless a “settlement” upon trust for “persons by way of succession” within the definition in s. 2, sub-s. 1, of the Settled Land Act, 1882. It also came strictly within s. 63 of the same Act, and the lady must be deemed to be tenant for life within the meaning of the Act. *In re CHILDS’ SETTLEMENT* — **Kekewich J. 348**

**SETTLEMENT**—Post-nuptial settlement—Intention to “delay, hinder, or defraud creditors” — — — — **157**  
See FRAUDULENT CONVEYANCE.

— Settlement of personality—Power to invest in land — Capital money — Improvements — — — — **348**  
See SETTLED LAND. 5.

**SEWERS—Sewer and Sewage Works—Right to Support of—Mines and Minerals—Adjacent Lands—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 15, 16, 175, 176, 308; *Public Health Act, 1875* (*Support of Sewers*) *Amendment Act, 1883* (46 & 47 Vict. c. 37), ss. 2, 3, 4, 5.**

In August, 1875, an Act was passed confirming a provisional order of the Local Government Board enabling the corporation of B. to acquire certain specified lands, under the Lands Clauses Consolidation Acts, for the purpose of carrying out sewage works.

In October, 1875, the corporation gave notice to treat, in respect of some of these lands (except the mines and minerals), to the owner thereof.

The question of compensation was referred to arbitration, and in August, 1876, a sum was awarded to the landowner as compensation for the lands with the exception of all minerals.

The corporation having paid the compensation money, the landowner in May, 1878, conveyed to the corporation the lands, except the mines and

**SEWERS—continued.**

minerals under the same, reserving to the owner for the time being thereof full power to work and carry away the same by means of underground workings only:—

*Held*, that by virtue of this conveyance the corporation acquired, by common law—(1.) the natural right to support of the land conveyed by the subjacent minerals and the adjacent lands of the party conveying; (2.) a like right of support for any buildings or works then reasonably within the contemplation of the parties.

In April, 1876, the corporation gave the same landowner notice, under the Public Health Act, 1875, of its intention to construct an outfall sewer in, under, or through other lands of his. The landowner thereupon gave the corporation notice, under the same Act, claiming compensation in respect of this exercise of the corporation's statutory power. This matter was referred to arbitration under the Act, and in February, 1878, the umpire made his award, purporting to be under s. 308 of the Public Health Act, 1875, and giving the owner of the land for the time being in which the sewer was a rent-charge or annuity of so much per lineal yard of the sewer so far as it passed through the land. There was no evidence that the umpire had not taken into consideration the fact that the Public Health Act, 1875, conferred on the corporation the right of support for the sewer by the subjacent minerals, if not also by the land adjacent to the strip occupied by the sewer, as (having regard to *In re Dudley Corporation* (1881), 8 Q. B. D. 86) it was held he ought to have done.

In 1904 the lessees of the mines under the land conveyed and the land in which the outfall sewer lay gave the corporation notice of their intention to work a seam of coal lying under or within forty yards of the sewage works and the outfall sewer. The corporation declined to treat as to payment of compensation, and claimed the right to support of the sewage works and the sewer.

The lessees, and the owners of the mines in the land conveyed and of the land in which the sewer lay, commenced in 1905 an action claiming declarations that, having regard to the Public Health Act, 1875 (*Support of Sewers*) Amendment Act, 1883, the corporation was not entitled to the support of either the sewage works or the outfall sewer by the subjacent mines, and that the plaintiffs were entitled to work the mines without paying compensation for any damage which would result from the working to the sewage works or sewer:—

*Held* that, on the true construction of s. 5 of the Act of 1883, the prior sections of the Act had no application to either the sewage works or the sewer, and that the rights of support of the corporation in respect thereof were unaffected by the Act. *JARY v. BARNELEY CORPORATION*

**Parker J. 600**

— Drain—Vesting in local authority—Title—Defect — — — — **191**  
See VENDOR AND PURCHASER. 3.

**SHAREHOLDERS AND SHARES—Company.**  
See under COMPANY.



**SHARES**—Ship—Equitable interests—Unregistered mortgage—Contract to sell share to part-owner without notice—Mortgagee's right to stop application of purchase-money — — — 284  
See SHIPPING.

**SHELLEY'S CASE**—Rule in—Will—Gift to a person for life and then "to his sons and their sons in succession"—Tenant in tail—Costs — — — 406  
See WILL. 5.

**SHIPPING**—Ship—Shares—Equitable Interests—Unregistered Mortgage—Contract to sell Shares to Part-owner without Notice—Purchaser to apply Part Purchase-money in discharging Vendor's Debt to Ship—Registered Transfer—Mortgagee's Right to stop Application of Purchase-money — Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 33, 56, 57.

The managing owner of a ship contracted to sell shares of which he was registered owner to other part-owners, who were to apply the purchase-money in discharging the vendor's debt to the ship and pay the balance to the vendor. The shares were forthwith transferred to the purchasers by registered bill of sale. After the contract and transfer, but before the purchase-money was paid or applied, the purchasers received notice of an unregistered mortgage prior in date to the contract. In an action by the mortgagees to stop the entire purchase-money :—

*Held*, that as s. 56 of the Merchant Shipping Act, 1894, enabled the vendor as registered owner, not only "absolutely to dispose" of the shares, but also "to give effectual receipts" for the purchase-money, it enabled him to enter into a valid contract as to the application of the purchase-money, and therefore the purchasers' contractual right to apply part of the purchase-money in discharge of the vendor's debt to the ship, a right in which as part-owners they were peculiarly interested, took precedence over the prior unregistered mortgage.

*Black v. Williams*, [1895] 1 Ch. 408, 421, applied. **BARCLAY & CO., LIMITED v. POOLE**  
Swinfen Eady J. 284

**SOLICITOR**—Bill of Costs—Taxation—Agreement in Writing—Contentious Matters—Signature—Enforcement—Attorneys and Solicitors Act, 1870 (33 & 34 Vict. c. 28), s. 4.

The plaintiff, a solicitor, claimed in an account which was being taken before the Master a sum of 635*l.* alleged to be due under a memorandum signed by the defendants, in which they agreed the balance due to the plaintiff for his costs of contentious business previously done by him on their behalf. This memorandum was referred to in a letter signed by the plaintiff's firm and written by them to the defendants :—

*Held*, on the facts, that there was an agreement in writing signed by both parties; that even if that were not so there was an agreement signed by the defendants, and that was a sufficient agreement in writing within s. 4 of the Attorneys and Solicitors Act, 1870; and that the agree-

**SOLICITOR**—continued.

ment must be referred to the taxing Master for examination.

*Pontifex v. Farnham*, (1893) 41 W. R. 238, doubted. **BAKE v. FRENCH** (No. 2)

Warrington J. 215

2. — Charging Order—Property "Preserved"—Solicitors Act, 1860 (23 & 24 Vict. c. 127), s. 28—Administration Action—Trustees Defendants—Compromise—Costs of all Parties—Provision for Payment—Result of Action—Destruction of Trust Estate—Property Managed and Retained—Assets insufficient for Payment of Costs—Costs of Plaintiff's Solicitors—Costs of Trustees—Trustees' Right of Indemnity—Priority.

In an action by beneficiaries under a will against the trustees for (inter alia) execution of the trusts of the will, an account of the testator's business, which had been carried on by the trustees under a power in that behalf, and administration, a receiver and manager of the business was appointed on motion, and the action was ultimately compromised at the trial, one of the terms of compromise being that the costs of all parties should be paid out of the estate, including in the costs of the trustees all costs, charges, and expenses incurred by them as executors and trustees of the will. In the result the action proved disastrous to the trust estate, the business, which previously had been profitable, having to be closed down for want of capital, and the assets of the estate being insufficient to pay the costs of all parties. On an application by the plaintiffs' solicitors for a charging order for their costs under s. 28 of the Solicitors Act, 1860, and by the trustees for a declaration of priority in respect of their costs, charges, and expenses :—

*Held* by Kekewich J. (applying *Baile v. Baile*, (1872) L. R. 13 Eq. 497), that, inasmuch as the property had been managed and retained for the rightful owners, it had been "preserved" within the meaning of s. 28; that it did not matter that in fact the property when it had been preserved for the benefit of the parties entitled yielded little or nothing for them; and that in the circumstances the plaintiffs' solicitors were entitled to a charging order for their costs; but

*Held* further by Kekewich J., that, having regard to the long-established practice of the Chancery Division indemnifying trustees for all expenditure properly incurred in relation to their trust estate, and also to the express terms of the compromise, the defendant trustees were entitled to payment of all their costs, charges, and expenses in priority to the charging order obtained by the plaintiffs' solicitors.

Decision of Kekewich J. affirmed. *In re TURNER. WOOD v. TURNER* — — C. A. 126

The order in this action (reported [1907] 2 Ch. 126), as ultimately entered, set out. *In re TURNER. WOOD v. TURNER* — — C. A. 539

3. — Costs—Taxation—Lease—Covenant for Renewal—Costs of investigating Lessee's Title—Practice—Scale Fee—"Business connected with Lease"—Solicitors' Remuneration Act, 1881 (44

**SOLICITOR**—*continued*.

& 45 Vict. c. 44)—*General Order under Solicitors' Remuneration Act, 1881, r. 2 (b), (c), Sched I., Part II.—Solicitor and Client.*

A perpetually renewable lease granted by the City Corporation contained a covenant that the lessors would make the renewals "at the request, costs, and charges of the lessee." The lessors incurred certain costs in investigating the title of applicants for a renewal, and these were disallowed on a taxation:—

*Held*, that the words of the covenant meant that the lessors were to be at no cost, and therefore the lessors were entitled to the costs which were reasonably and necessarily incurred in such investigation of title.

*Held*, also, that such costs were not covered by the scale fee charge "for preparing, settling and completing lease and counterpart" under the General Order made under the Solicitors' Remuneration Act, 1881.

Until it was ascertained that the applicant for a renewal was entitled thereto, the "business connected with" the lease referred to in r. 2 of the General Order had not been reached. *In re BAYLIS, A SOLICITOR* — **Kekewich J. 54**

— Costs — Taxation — Summons to review — Refusal — Appeal — Leave — — **145**  
*See PRACTICE. 1.*

— Limitations, Statute of — Part payment — Solicitor's bill — Recovery of moneys due to client — Retainer on account with assent of client — — — **331**  
*See LIMITATIONS, STATUTE OF. 2.*

**SPECIFIC DEVISE** — Partnership realty — Will — Deceased partner — Solvent partnership — — — — **88**  
*See WILL. 4.*

**STAMPS** — Company — Winding-up — Voluntary liquidator — Duty to stamp and file contracts with respect to shares issued for a consideration other than cash — **92**  
*See COMPANY. 8.*

**STATUTES.**

1571.

13 Eliz. c. 5—*Fraudulent Conveyances* — **157**  
*See FRAUDULENT CONVEYANCE.*

1670.

22 & 23 Car. 2, c. 10, s. 5—*Statute of Distributions*— — — — **84**  
*See WILL. 1.*

1830.

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**TRADE MARK**—Registration—"Distinctive Mark"—*Trade Marks Act, 1905* (5 *Edw. 7, c. 15*), s. 9, sub-ss. 4, 5.

A German company who were the owners of the Apollinaris mineral water spring at Neuenahr, in Rhenish Prussia, applied to register the word "Apollinaris" in England in class 44 in respect of mineral waters.

There was evidence of very extensive user of the word "Apollinaris," and that it meant the water from the applicants' spring and no other water. The Board of Trade having required the application to be made to the Chancery Division:—

*Held* that, on the applicants undertaking "not to use the mark except in respect of water from their property at Neuenahr or the neighbourhood thereof, the word "Apollinaris" ought to be deemed a "distinctive mark" within the meaning of s. 9, sub-s. 5, of the Trade Marks Act, 1905, and might fairly be registered under the Act.

When the evidence shews that the word sought to be registered distinguishes the goods of the proprietor of the mark, it is not the less "distinctive" of the goods of the proprietor because it also distinguishes the goods irrespective of the proprietor. *In re* "APOLLINARIS" **TRADE MARK** — — **Kekewich J. 178**

2. — Registration—Identical Mark for different Description of Goods—Discretion of Registrar—Associated Trade Marks—Assignment—Costs of Registrar—*Trade Marks Act, 1905* (5 *Edw. 7, c. 15*), s. 12, sub-ss. 2, 3; ss. 22, 24, 27, 48.

A company which carried on several separate and distinct businesses registered the trade mark "B.S.A." in class 19 in respect of arms, ammunition, and stores. They subsequently applied to register the same trade mark in class 22 in respect

**TRADE MARK**—continued.

of cycles, motor cycles, and automobiles. The registrar required them, as a condition of registration, to agree that the marks should be associated in accordance with the provisions of s. 24 of the Trade Marks Act, 1905.

On the applicants declining this condition, the registrar, in the exercise of his discretion under s. 12, sub-s. 2, of the Act, declined to register the mark.

On appeal from this decision:—

*Held*, that the discretion vested in the registrar was not an absolute discretion, but one to be exercised subject to the provisions of the Act. Sect. 24 was one of such provisions, and had nothing to do with the registration of identical trade marks, but of marks "so closely resembling a trade mark of the applicant already on the register for the same goods or description of goods as to be calculated to deceive or cause confusion if used by a person other than the applicant."

The two classes of goods in question were also not the "same goods or description of goods," and the registrar must be directed to proceed with the registration of the mark in class 22 without the condition of association.

*Held*, further, that the applicants, although successful, must pay the costs of the registrar, who was a public official occupying a fiduciary position, and had done nothing to disentitle himself to costs. *In re* BIRMINGHAM SMALL ARMS COMPANY'S APPLICATION — **Kekewich J. 396**

3. — Registration—"Motorine"—Similar Name already on Register—"Same Class or Description of Goods"—"Calculated to deceive"—Onus of Proof—Rectification of Register—"Motorine"—Descriptive Word—Invented Word—"Word having no direct reference to character or Quality of Goods"—*Trade Marks Act, 1905* (5 *Edw. 7, c. 15*), s. 9, sub-s. 4; ss. 11, 19, 21.

In 1901 the opponents registered the word "motorine" as a trade mark for lubricating oil, with a disclaimer of the right to the exclusive use of the word "motor." Since registration they had sold large quantities of a lubricating oil suitable for, but not confined to, motors under that name. In 1906 the applicants applied to register the word "motricine" as a trade mark for a spirit for motive power purposes derived from petroleum. The opponents opposed the application, and the registrar refused to register the mark. On an application by the applicants that the registrar might be directed to proceed with the registration of their mark, and that the opponents' mark might be expunged from the register:—

*Held*, that under s. 11 of the Trade Marks Act, 1905, the onus of shewing that the proposed trade mark was not calculated to deceive rested on the applicants; that they had failed to discharge that onus; that that being so the Court would decline to exercise its discretion under s. 21 of the Act of allowing conditional registration; and that the application to register must therefore be refused.

*Eno v. Dunn*, (1890) 15 App. Cas. 252, followed.

*Held*, also, that the word "motorine" had



**TRADE MARK**—*continued*.

"no direct reference to the character or quality of the goods," and was therefore a good trade mark under s. 9, sub-s. 4, of the Act, and that the application to expunge it from the register must consequently be refused. *In re COMPAGNIE INDUSTRIELLE DES PÉTROLES' APPLICATION. In re PRICE'S PATENT CANDLE COMPANY'S TRADE MARK* — — — **Warrington J. 435**

4. — *Registration—Patented Article—Invented Word descriptive of Patented Article—Fancy Word—Registration—Removal from Register after Twenty Years—Patents, Designs and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), s. 64—Trade Marks Act, 1905 (5 Edw. 7, c. 15), ss. 3, 9, 35, 36.*

In construing s. 36 of the Trade Marks Act, 1905, on an application to expunge from the register a trade mark registered under a previous Trade Marks Act, the question is, not whether the mark would at the date of its registration have been registrable under the Act of 1905 had that Act then been in force, but whether the mark is at the date of the application to expunge, i.e., the decision, a mark registrable under the Act of 1905.

An invented word descriptive of and created and used to denote a patented article is not registrable as a trade mark under the Act of 1905.

In 1881 G. obtained letters patent for a new kind of pen which he called the "Cyclostyle," and assigned his patent to F., who from 1882 onwards manufactured and sold the pen and its accessories, ink, roller and paper, under the name of "Cyclostyle," and in 1884 he registered that word under the Trade Marks Act, 1883, in respect of a certain class of goods that he sold, i.e., stationery, including the pen and its accessories, and that word became well known to and was used by the trade and the public to denote the patented article and its accessories.

On an application under s. 35 of the Trade Marks Act, 1905, by a party aggrieved to expunge the word from the Register of Trade Marks on the ground that it was descriptive of a patented article and never had been, and was not, registrable under any of the Trade Marks Acts :—

*Held*, that the word was not registrable under the Act of 1883, because, at the date of its registration, it was not a fancy word not in common use, but was a word descriptive of a patented article :—

*Held*, also, that the word was not registrable under the Act of 1905, because it was not "an invented word" within the meaning of ss. 3 and 9 of that Act, but the name of a patented article which could not be said to be distinctive of the goods of a particular trader.

The word was therefore ordered to be removed from the register. *In re REGISTERED TRADE MARK No. 37,760 of DAVID GESTETNER*

**Neville J. 478**

**TRADE NAME**—*Company—Similarity of Name—Deception—Right of Individual to use his own Name—Transfer to Company.*

Although, in the absence of fraud or false representation, a man is entitled to carry on

**TRADE NAME**—*continued*.

business in his own name in competition with a similar business, previously well-established under the same name, notwithstanding that confusion and mistake may in consequence arise, yet, if he has never carried on such a business on his own account or in partnership with others, he cannot, by promoting and registering a company with a title of which his name forms a part, confer upon that company the rights which he, as an individual, possesses in the use of that name.

*Tussaud v. Tussaud*, (1890) 44 Ch. D. 678, observed upon. *FINE COTTON SPINNERS and DOUBLERS' ASSOCIATION, LIMITED, and JOHN CASH & SONS, LIMITED v. HARWOOD CASH & CO., LIMITED* — — — **Joyce J. 184**

2. — *Company—Similarity of Name—Name Descriptive of Article and Process used—Injunction—Company—Registered Name—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 20.*

In considering whether the name of a registered company so nearly resembles the name of another company previously registered "as to be calculated to deceive" within the meaning of s. 20 of the Companies Act, 1862, the principles to be applied are at any rate extremely analogous to those which are applicable in ordinary passing-off cases in which the Court has to consider whether a trade name, or a trade description, or a description of a particular class of goods, or the get-up of a particular class of goods, is or is not likely to deceive.

A distinction must always be drawn between cases in which the words complained of are words of common ordinary meaning and cases in which the words complained of more or less partake of the character of "fancy" words or primarily do not relate to the article, but to the person who makes it.

The onus of proving that words which are commonly and properly used as descriptive words have such a secondary or subsidiary meaning as to entitle the person who has used them to their exclusive use lies on that person, and is not easily discharged.

In 1901 one B. obtained letters patent in respect of machinery to be used for cleaning carpets and the like by a method depending on suction (caused by a vacuum) operating through pipes the nozzles of which were moved over the articles to be cleaned. B. called his protected machinery a "vacuum cleaner" and the process a "vacuum cleaning." In 1902 B. sold his patent to a company, registered in the same year, called the "Vacuum Cleaner Company, Limited." In 1903 the patent was assigned to the plaintiff company, which was registered in that year and called the "British Vacuum Cleaner Company, Limited," and was formed to take over the undertaking of the previous company. The plaintiff company formed and was interested in several other companies, each of which had as part of its name the words "vacuum cleaner" in juxtaposition, with a licence to use B.'s invention within a defined limit distinct from the area of the plaintiff company's operations. In 1904 one X. obtained letters patent for cleaning by suction created by a vacuum and with pipes and a nozzle,

**TRADE NAME**—*continued.*

but differing in material parts from B.'s invention. In 1906 the defendant company was registered as the "New Vacuum Cleaner Company, Limited," with the view of taking, and working in a district of the metropolis, a licence to use the invention patented by X. In an action to restrain the defendant company from using the words "vacuum cleaner" in conjunction as part of its registered name or of any other name so as to lead to the defendant company being taken for the plaintiff company or being supposed by the company to be connected with it, it was proved (a) that a large proportion of the plaintiff company's customers addressed letters to them as the Vacuum Cleaner Company, with or without the word "limited"; (b) that since the registration of that company the words "vacuum cleaner" had been associated with the machine made under B.'s patent and used by that company, and that those words and the words "vacuum cleaning" had been understood by the public to be a particular kind of cleaning and a particular process, and that while the plaintiff company had a monopoly of a cleaner and a process of that sort, the public connoted the fact that the machine was the machine of the plaintiff company:—

*Held* that, the words "vacuum cleaner" being merely descriptive words, the case was within the principles laid down by Lord Davey in *Cellular Clothing Co. v. Marton and Murray*, [1899] A. C. 326, 346; that the words had no secondary or subsidiary meaning; and that the plaintiff company was not entitled to have the defendant company restrained from using the words.

*Reddaway v. Banham*, [1896] A. C. 199, distinguished.

*Held*, also, that the plaintiff company, by allowing subsidiary companies to be formed under names containing the words "vacuum cleaner" in conjunction, had admitted that another company with a name so containing those words would not necessarily be confused with the plaintiff company.

Observations as to the weight to be attached to evidence adduced to shew the probability of deception by the use of somewhat similar names. **BRITISH VACUUM CLEANER COMPANY, LIMITED v. NEW VACUUM CLEANER COMPANY, LIMITED** — — — **Parker J. 312**

**TRANSFER**—Lunatic out of the jurisdiction—Foreign curator—English stocks and shares—Discretion of judge in Lunacy  
*See* LUNACY. 2. **14**

**TRUST.**

*See* under TRUSTEE.

**TRUSTEE**—*Investment—Settlement—Construction—Shares in Company—Power to retain "in the present State of Investment thereof"—Substitution of Shares in different Companies—Retainer of Shares—Unauthorized Investments—Accretion—Capital or Income.*

By a marriage settlement made in 1902 it was declared that the trustees thereof should hold certain investments (which had been transferred by the husband into their joint names) upon

**TRUSTEE**—*continued.*

trust either to allow the same "to remain in the present state of investment thereof" or, with specified consents, to sell the same, and invest the proceeds in investments therein mentioned and pay the annual income thereof to the husband for life, and after his death to his wife for life, and after the death of both, to hold the investments upon the usual trusts for the children of the marriage, with an ultimate trust, in the event of there being no children, in favour of the husband absolutely.

By clause 11 of the settlement the trustees were authorized to exercise any preferential right that might be offered to them to subscribe for new or other shares in any company in which they held shares or stock, and to dispose of the same, and every premium or profit arising therefrom was to be applied by them as if the same were income. One of the investments so transferred to the trustees consisted of 109 shares in an American financial company called the Northern Securities Company, which was formed to acquire and hold shares in other corporations, and held a large number of shares in, and controlled the policy of, two American railway companies, the Great Northern Railway Company and the Northern Pacific Railway Company.

In 1904 the capital stock of the Northern Securities Company was cancelled to the extent of 99 per cent., and in lieu of their 109 shares in that company the trustees of the settlement received thirty-two fully paid-up shares and a fractional share in the capital stock of the Great Northern Railway Company, forty-two fully paid-up shares and a fractional share in the capital stock of the Northern Pacific Railway Company, and one fully paid-up share and a fractional share in the Northern Securities Company.

In 1905 and 1906 the trustees received three options to take up new stock in respect of the thirty-two shares in the Great Northern Railway Company and of the forty-two shares in the Northern Pacific Railway Company, and in exercise of these options they paid certain instalments, and in one instance sold the right of option. The husband having died and there being no children of the marriage, the wife claimed the proceeds of the options as income under clause 11 of the settlement, subject to repaying the trustees what had been paid in respect of the new shares:—

*Held*, that the shares in the two railway companies were not the same shares which were transferred to the trustees at the date of the settlement, and therefore the trustees were not authorized by the terms of the settlement to retain them.

*In re Smith*, [1902] 2 Ch. 667, distinguished and discussed.

*Held*, accordingly, that the accretions to the shares, by reason of the exercise of the options, belonged to the capital of the trust estate, and could not be treated as income under clause 11 of the settlement. *In re ANSON'S SETTLEMENT. EARL OF LOVELACE v. ANSON*

**Kekewich J. 424**

— Charitable trusts.

*See* under CHARITY.

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— Costs — Solicitor — Charging order — Costs of plaintiff's solicitors — Costs of trustees—Trustees' right of indemnity — Priority — — — — 126  
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— Costs out of settled fund—Honest trustee —Settlement set aside—Post-nuptial settlement — — — — 157  
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— Negligence—Omission to get possession of title deeds — — — — 104  
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**ULTRA VIRES** — Director — Appointment of limited company—Winding-up 458  
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— Railway company — Special Act — Conveyance subject to restrictive covenant — Resale of part of land not required—Validity of covenant — — — — 366  
See VENDOR AND PURCHASER. 2.

**"VACATING OFFICE"**—Managing director—Resignation—Withdrawal before acceptance—Articles—Construction 370  
See COMPANY. 5.

**VENDOR AND PURCHASER** — *Commercial Company—Memorandum of Association—Power to acquire Land—No Express Power of Sale—Constitution of Company—Implied Power.*

A commercial corporation has such powers as are expressly or impliedly warranted by its constitution.

The objects of a colliery company incorporated under the Companies Act, 1862, as expressed in its memorandum of association, including the purchasing or taking upon lease and working of certain coal mines and mineral lands, the selling of coal and other products, the carrying on generally of the businesses of colliers and coal merchants, and the acquiring of real estate or any right or interest therein. There was no express power of sale of real estate:—

*Held*, that the company had power to sell land which it had acquired, a power to sell real estate being impliedly warranted by the constitution of the company.

*Johns v. Balfour*, (1889) 1 Megone, 191, applied.

*In re* KINGSBURY COLLIERIES, LIMITED AND MOORE'S CONTRACT — *Kekewich J.* 259

2. — *Railway Company—Special Act—Land acquired for extraordinary Purposes—Conveyance subject to Restrictive Covenant—Resale of Part of Land not required—Validity of Covenant—Ultra Vires—Railways Causes Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 45—Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), ss. 13, 127, 128.*

By a special Act a railway company were authorized to acquire certain land for the purpose

**VENDOR AND PURCHASER—continued.**

of enlarging their stations "and for other purposes of and connected with their undertaking." Under this power the railway company acquired the land by voluntary agreement and covenanted in their conveyance that they and their assigns would at all times thereafter use the land for a passenger station "and for no other purpose." Afterwards the railway company contracted to sell part of the land that they did not require, and the purchaser required the covenant to be released:—

*Held*, that the covenant was ultra vires the railway company, and that they could sell free from the restrictions contained in it.

The principle of *Ayr Harbour Trustees v. Oswald*, (1883) 8 App. Cas. 623, applied. *In re* SOUTH EASTERN RAILWAY COMPANY AND WIFFIN'S CONTRACT — *Neville J.* 366

3. — *Title—Defect—Light—Guarantee—Restrictive Stipulation—Drain—Sewer—Vesting in Local Authority—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 4, 13, 41—Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 19.*

The plaintiffs by an open contract agreed to buy from the defendants two houses "subject to right of light with owner of adjoining property being guaranteed." The houses had been recently built by the vendor, and contained no ancient lights. The adjoining house had also been built by the vendor and sold by him in 1897 to D., on which occasion he and D. mutually covenanted not to do anything to prejudice the right of light to the windows of each other's premises:—

*Held*, that this restrictive stipulation was a defect in the title.

Under part of the premises contracted to be sold ran a drain, into which opened the drains of two adjoining houses:—

*Held*, that this drain was a sewer, and was vested in the local authority under s. 13 of the Public Health Act, 1875; that s. 19 of the Public Health Acts Amendment Act, 1890, did not prevent it from vesting; that the vendor was therefore unable to convey all that he had contracted to sell; and that he had not made a good title.  
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*Warrington J.* 191

**VESTED LEGACIES**—Interest until payment—Gifts to persons "born" previously to date of will—Infant "en ventre sa mère" — — — — 46  
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**WALLS**—Settled estates—Capital money—Improvements—Rebuilding garden walls  
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**WARD OF COURT**—Infant—Guardian—Religious education, Change of—Religion of father—Discretion of Court — 557  
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**WATER**—Settled land — Improvements — Irish estates—Water supply—Fire hydrants and hose—Laundry — — — — 417  
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**WIDOW**—Intestacy of husband—Contingent reversionary interest—Real and personal estate — — — 270  
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— Marriage—Nullity—Marriage before Registrar—False notice—Widow married in maiden name — — — 592  
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**“WIDOW”**—Will—Construction—Bigamous marriage—Secondary meaning of “widow” — — — 35  
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**WIFE**—Husband and.  
*See under HUSBAND AND WIFE.*

**WILL**—*Executor—Express Trust of Residue—Partial failure of beneficial Interest—Next of Kin—Advancements to Children by Testator—Hotchpot—Statute of Distributions, 1670 (22 & 23 Car. 2, c. 10), s. 5—Executors Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 40), s. 1.*

A testator bequeathed the residue of his estate to his executors upon trust, as to 1500*l.* (part thereof), to invest and pay the income to his daughter A. for life, and after her death to dividé the capital amongst her issue; and as to the remainder of the residue upon trust for the benefit of his children (including A.) and their issue. A. survived the testator and died without issue, whereby the 1500*l.* was undisposed of and passed to his next of kin, who were four of his daughters and the children of a deceased daughter. The testator during his lifetime had made advances to all his daughters in varying amounts:—

*Held*, that the Executors Act, 1830, did not apply, and that the 1500*l.* must be distributed amongst the next of kin without bringing the advances into hotchpot.

*In re ROBY. HOWLETT v. NEWINGTON*  
 Neville J. 84

**2. — Mortgage deferring payment of Interest. — Tenant for Life and Remainderman—Power to postpone Conversion—“Property not actually producing Income”—Construction of Will—Settled Estate.**

Testator by his will devised and bequeathed his residuary real and personal estate to trustees upon trust for sale and conversion and investment, and directed them to pay the income of the investments to his wife for life. The will empowered the trustees to postpone conversion, and provided that the income of unconverted estate should be applied as if it arose from converted estate, and that no property not actually producing income should be treated as producing income or as entitling any person to the receipt of income. The testator died in 1901. Amongst the securities forming part of his estate at his death was a mortgage which recited that the mortgagor was indebted to the testator in a certain sum and that it had been agreed that the payment of his debt should be postponed, and the mortgagor thereby covenanted to pay the amount of the debt with simple interest at his

**WILL—continued.**

death, and if the aggregate amount of such sum and interest was not then paid, to pay interest on such aggregate sum by equal half-yearly payments, the first of such payments to become due six months after his death. The mortgagor died in 1906, in the lifetime of the testator's widow, the tenant for life. The widow died shortly afterwards:—

*Held*, that the interest on the mortgage attributable to the period between the death of the testator and the death of the mortgagor belonged to the estate of the widow, and not to that of the testator.

*In re Hubback*, [1896] 1 Ch. 754, applied.

*In re LEWIS. DAVIES v. HARRISON*  
 Warrington J. 296

**3. — Next of Kin according to the Statute—Time for ascertaining Class—Will—Construction.**

A testator, who died in 1884, gave a life interest in a fund to his nephew S., and certain contingent interests to the children and issue of his said nephew, and declared that if no child or issue of his said nephew attained a vested interest, the fund was to be held “for such person or persons as on the death of my said nephew S. will be entitled to [*sic*] as my next of kin under the statute.”

At the date of the death of the testator, the nephew S. was his sole next of kin. S. died without issue in July, 1906, having made a will and appointed executors:—

*Held*, that the persons entitled were to be ascertained at the death of the testator, and that the executors of S. were therefore entitled to the fund; that even if the words “at the death of my nephew S.” were equivalent to “then,” they referred only to the time when the persons entitled would come into possession of what had been bequeathed to them, as laid down by *Bullock v. Downes*, (1860) 9 H. L. C. 1.

Decision of Parker J., [1907] 1 Ch. 450, affirmed. *In re WILSON. WILSON v. BATCHELOR*  
 C. A. 572

**4. — Partnership — Deceased Partner — Specific Devise of Partnership Realty—Solvent Partnership.**

One of the two partners in a solvent business died and by his will, after bequeathing his share in the partnership to his executors upon certain trusts, made a specific devise of his share in certain freeholds which formed part of the partnership assets. The other partnership assets were more than sufficient to pay the partnership debts:—

*Held* that, as between the beneficiaries claiming under the will, the specific devise of the share in partnership freeholds was valid, and that the devisees took it free from liability to contribute to the partnership debts.

*Farquhar v. Hadden*, (1871) L. R. 7 Ch. 1, distinguished. *In re HOLLAND. BRETTELL v. HOLLAND* — — — Neville J. 88

**5. — Shelley's Case, Rule in—Gift to a Person for Life and then “to his Sons and their Sons in Succession”—Tenant in Tail—Rule in**



**WILL**—*continued*.

*Shelley's Case—Costs—Practice—Uniformity—Will—Construction—Adjourned Summonses.*

By his will G. B. devised a mansion-house and copyhold property to trustees upon trust to the use of his eldest son G. B. B., to permit him during his life to occupy the same or receive the rents arising therefrom, and after his decease to permit the eldest son of G. B. B. to occupy or receive the rents of the said estate during his life, "and then to his sons and their sons in succession," and in default thereof to the second son of G. B. B. and his sons in succession, and in default to the third and other sons of G. B. B. and their sons in succession, according to the priority of their birth, and in case his eldest son G. B. B. should die without leaving any son or male descendant, then upon trust to hold the same estate to the use of the testator's second son W. M. B. for life, with remainder to his eldest and other sons and their issue in succession, with remainders over.

The copyhold property was subsequently enfranchised and disentailed. The plaintiff W. W. B., as the eldest son of G. B. B., took out a summons, to which W. M. B. and the trustees of the wills of G. B. and G. B. B. were made respondents, asking for a declaration of his title to an estate in tail male in possession in the mansion-house and property, and that the costs of and incidental to the application might be provided for:—

*Held*, that upon the true construction of the will, and having regard to the rule in *Shelley's Case* (1579), 1 Rep. 93b, W. W. B. was entitled to an estate in tail male in possession of the property in question; and that, although in form it was a case of adverse litigation, yet in substance it was an amicable proceeding for the determination of a question for the benefit of all concerned, and therefore the costs of all parties must be taxed as between solicitor and client, and come out of the estate.

Statement of the practice with regard to costs in costs arising on adjourned summonses.

*In re BUCKTON. BUCKTON v. BUCKTON*  
**Kekewich J. 406**

**6. — Vested Legacies—Interest until Payment—Infants—Appropriation—Payment into Court—Gifts to Persons "born" previously to Date of Will—Infant "en ventre sa mère"—Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 42—Will—Construction.**

By his will dated October 17, 1904, a testator, after giving a number of legacies, gave 500*l.* to each of his great-nephews and great-nieces "born previously to the date of this my will," to whom no other pecuniary bequest had been given by his will. He then gave his residuary estate to trustees upon trust for sale and conversion, and out of the proceeds to pay testamentary expenses, debts, and legacies and divide the net residue as therein mentioned; and the testator empowered his trustees to postpone the sale and conversion, and the payment of legacies, until after sale and conversion, but he declared that all legacies not paid within a year from his death should carry interest at 4*l.* per cent. A large number of the legatees were infants.

**WILL**—*continued*.

One of the great-nieces was not born until March 14, 1905, and was thus *en ventre sa mère* at the date of the testator's will:—

*Held*, that the trustees could not free the residue by setting apart proper securities to answer the legacies to infants, but they could pay the legacies into Court under s. 42 of the Trustee Act, 1893, when the clause as to the payment of the 4 per cent. interest would cease to operate.

*Held*, also, upon the true construction of this will, that the child "*en ventre sa mère*" was not entitled to a legacy, as the persons whom the testator intended to benefit were persons of whose existence he knew, namely, those "born," in the ordinary sense of the word, at the date of his will. *In re SALAMAN. DE PASS v. SON-NENTHAL* — — — — **Kekewich J. 46**

— Administration.

*See under ADMINISTRATION.*

— Annuity.

*See under ANNUITY.*

— Residue—Tenant for life and remainderman — Annuity — Apportionment — Capital and income — — — **596**  
*See SETTLED LAND. 1.*

— "Testamentary expenses" — Costs — Administration — — — **149, 154, n.**  
*See PRACTICE. 2, 3.*

**WINDING-UP OF COMPANY.**

*See under COMPANY.*

**WINDOW**—Ancient lights—Alteration in height of window—Prescription — — — **500**  
*See LIGHT 1.*

**WORDS**—"Born" — — — — — **46**  
*See WILL. 6.*

— "Consent or agreement" — — — — **516**  
*See LIGHT. 2.*

— "Endowment" — — — — — **486**  
*See CHARITY. 2.*

— "External wall" — — — — — **23**  
*See LONDON.*

— "Height" — — — — — **23**  
*See LONDON.*

— "His heirs or assigns" — — — — **20**  
*See MORTGAGE.*

— "Improvements" — — — — — **496**  
*See SETTLED LAND. 4.*

— "Inclosing" — — — — — **417**  
*See SETTLED LAND. 3.*

— "Just and equitable" — — — — **458**  
*See COMPANY. 4.*

— "Motorine" — — — — — **435**  
*See TRADE MARK. 3.*

**WORDS**—*continued.*

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| — “Motricine” - - - -            | 435 |
| <i>See</i> TRADE MARK. 3.        |     |
| — “Professional misconduct” - .. | 236 |
| <i>See</i> EVIDENCE.             |     |
| — “Settlement” - - - -           | 348 |
| <i>See</i> SETTLED LAND. 5.      |     |

**WORDS**—*continued.*

|                                   |              |
|-----------------------------------|--------------|
| — “Testamentary expenses” - - - - | 149, 154, n. |
| <i>See</i> PRACTICE. 2, 3.        |              |
| — “Vacating office” - - - -       | 370          |
| <i>See</i> COMPANY. 5.            |              |
| — “Widow” - - - -                 | 35           |
| <i>See</i> ADMINISTRATION. 3.     |              |











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